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# In the Supreme Court of the United States

OCTOBER TERM, 1980

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ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

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The Solicitor General, on behalf of the Army and Air Force Exchange Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 619 F.2d 1132.

## JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 18a-19a) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (App. D, *infra*, 20a-21a). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth at App. E, *infra*, 22a-35a.

## STATEMENT

On March 16, 1976, respondent was serving as an appointed managerial employee of the Army and Air Force Exchange Service (AAFES) at Fort Jackson, South Carolina.[1] On that date, respondent received notice of separation for cause based upon certain acts of misconduct off the job that allegedly reflected discredit upon the AAFES and rendered his continued employment incompatible with the best interests of the AAFES.[2] Respondent's discharge was sustained upon administrative review (App. A, *infra*, 1a-4a).

Respondent then brought this action in the United States District Court for the Northern District of Texas, alleging that his discharge was procedurally defective, arbitrary, capricious, unsupported by sub-

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[1] The AAFES is a nonappropriated fund instrumentality, which means that it does not receive its monies by congressional appropriations. See 10 U.S.C. 4779(c), 9779(c).

[2] On November 18, 1975, respondent was arrested for violation of state drug laws and on March 1, 1976, he pleaded guilty in state court to four counts charging him with possession of various illegal drugs (Complaint ¶ 8; Ex. A).

stantial evidence, an abuse of discretion, in excess of statutory authority, and in violation of his constitutional rights (App. A, *infra*, 4a). Respondent sought, *inter alia*, monetary damages including back pay (Complaint ¶¶ 20, 25).[3] The district court dismissed the suit for lack of subject matter jurisdiction (App. B, *infra*, 17a).

The court of appeals reversed (App. A, *infra*, 1a-16a). It held that the requisite jurisdiction over respondent's claims for monetary relief was provided by the 1970 amendment to the Tucker Act, 28 U.S.C. 1346(a)(2), which confers jurisdiction over claims founded upon express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES (App. A, *infra*, 6a-9a). The court acknowledged the AAFES' argument that respondent's action could not be based on a breach of contract theory because under governing regulations respondent served by appointment rather than by contract (*id.* at 7a-8a). But the court concluded that "[e]ven if the regulations label the *commencement* of [respondent's] employment as pursuant to 'appointment,'" the AAFES' regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to the regulations in its dealings with him" (*id.* at 8a; emphasis in original). Accordingly, the court ruled that respondent's allegation that his discharge violated controlling regulations was equivalent to an allegation of a breach of an implied-in-fact contract and that such a claim was sufficient under the Tucker Act to

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[3] Respondent also sought nonmonetary relief, including reinstatement, accrued vacation time and sick leave.

avoid dismissal on jurisdictional grounds (App. A, *infra*, 9a).[4]

## REASONS FOR GRANTING THE PETITION

The court of appeals has held in this case that because of the existence of exchange service regulations setting forth discharge procedures, an appointed exchange service employee has an implied-in-fact contract with the exchange service that entitles him, upon his discharge, to bring suit for money damages under the Tucker Act on the ground that his discharge was processed in violation of the applicable regulations. This holding is foreclosed by this Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976). In *Hopkins*, the Court drew a clear distinction between "contract" and "appointed" exchange service employees and held that only the former may sue the United States for wrongful discharge under the Tucker Act. In *Testan*, the Court held that federal employees who alleged that they had been improperly classified under Civil Service personnel regulations could not sue the United States for damages under the Tucker Act because even if the employees' substantive rights had been violated, the mere existence of a substantive right, without an explicit grant of entitlement to monetary relief for violation of that right, does not create the necessary waiver of sovereign immunity. Under the court of appeals' anal-

[4] The court of appeals also held that the district court had jurisdiction over respondent's claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (App. A, *infra*, 10a-15a). We do not seek review of this aspect of the court of appeals' decision.

ysis in this case, however, the employees in *Hopkins* and *Testan* would have had valid damage actions against the United States based on a breach of an implied-in-fact contract.

If the decision of the court of appeals is permitted to stand, the United States will be subjected to claims for money damages that were plainly not contemplated by Congress when it enacted the Tucker Act and when it amended that Act in 1970. In light of the manifest error of the decision below and the significance of the issue concerning the scope of federal court jurisdiction under the Tucker Act, review by this Court is warranted. However, because the outcome of this case is clearly controlled by the decisions in *Hopkins* and *Testan*, we believe that summary reversal would be appropriate.

1. The court of appeals correctly recognized (App. A, *infra*, 5a-7a) that the decision in this case turns on whether the United States has waived sovereign immunity to suit for money damages by a former AAFES employee alleging that he has been improperly discharged. As this Court recently reiterated in *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980):

> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969).

Such unequivocal expression must be found in a constitutional provision, statute or regulation that cre-

ates a substantive right against the United States for money damages or in a contract entered into by the United States. *Eastport S. S. Corp.* v. *United States*, 372 F.2d 1002, 1007-1009 (Ct. Cl. 1967). Because the Tucker Act is itself only a jurisdictional statute that does not create such an enforceable substantive right, it is necessary to look elsewhere to find the requisite waiver of sovereign immunity. See *United States* v. *Testan*, *supra*, 424 U.S. at 398. There is no constitutional provision, statute or regulation creating a substantive right, enforceable against the United States, to money damages for improper discharge from a military exchange. Neither the regulations governing employment in the Army and Air Force Exchange Service nor the statutes pursuant to which those regulations were promulgated create a substantive right to compensation from the federal government for wrongful discharge. Indeed, in 5 U.S.C. (Supp. II) 2105(c), Congress explicitly denied this right to exchange service employees by excluding them from coverage of certain laws administered by the Office of Personnel Management, including the Back Pay Act (5 U.S.C. (& Supp. III) 5596).[5]

Furthermore, a right to damages in this case cannot be founded upon an express or implied contract. Prior to 1970, this proposition was undisputed, be-

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[5] 5 U.S.C. (Supp. II) 2105(c) provides in pertinent part:

> An employee paid from nonappropriated funds of the Army and Air Force Exchange Service * * * is deemed not an employee for the purpose of—
>
> (1) laws * * * administered by the Office of Personnel Management * * *.

The Back Pay Act, 5 U.S.C. (& Supp. III) 5596, is administered by the Office of Personnel Management (see 5 U.S.C. (Supp. III) 5596(c)).

cause contracts with military exchanges were not contracts "with the United States." In *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), this Court observed that, although the military exchanges are "arms of the Government" and "integral parts of the War Department," the "Government assumes none of the financial obligations of the exchange." Thereafter, in a series of decisions [6] the Court of Claims held that because the government had assumed no liability for the financial obligations of the military exchanges, it could not be said to have consented to be sued on such obligations and, accordingly, no "claim against the United States" existed under the Tucker Act.

In 1970 Congress took steps to remove this perceived inequitable "loophole" [7] by amending the Tucker Act (Pub. L. No. 91-350, Section 1(a), 84 Stat. 449), to provide that:

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The Court in *United States* v. *Hopkins*, *supra*, considered the effect of this amendment on monetary

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[6] *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Cl. 1953); *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Cl. 1958); *Kyer* v. *United States*, 369 F.2d 714 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967).

[7] S. Rep. No. 91-268, 91st Cong., 1st Sess. 2 (1969); H. R. Rep. No. 91-933, 91st Cong., 2d Sess. 2 (1970).

claims advanced by discharged military exchange employees.

In *Hopkins*, an AAFES employee, claiming wrongful discharge, brought suit in the Court of Claims for money damages under the 1970 amendment to the Tucker Act. The government moved to dismiss the action for lack of subject matter jurisdiction. The Court of Claims ruled, however, that it had jurisdiction based upon an express or implied contract of employment. *Hopkins* v. *United States*, 513 F.2d 1360 (Ct. Cl. 1975).

This Court vacated and remanded to the Court of Claims, finding that that court had erred in assuming, without a sufficient examination of the applicable regulations, that Hopkins held his position by "contract" rather than by "appointment." 427 U.S. at 127, 130. The Court compared the status of "ordinary" employees of the AAFES, who are hired under one set of Army and Air Force regulations, with the status of "service contract" employees, who are hired under another totally different set of Army and Air Force regulations. The Court determined that "ordinary" employees serve by appointment, while others who perform "direct services" on or off the military bases, such as "janitorial and window cleaning service," are hired by contract. And it pointed out that the two categories are mutually exclusive, since the governing regulations expressly prohibit "exchange employees" from receiving service contracts. 427 U.S. at 127-129.

The Court concluded that the 1970 amendment to the Tucker Act was applicable to employment contracts as well as to contracts for goods and services and that AAFES *contract* employees thus have a right to sue for wrongful discharge in the Court of

Claims. 427 U.S. at 126. However, the Court reached a different conclusion with respect to "ordinary" AAFES employees, who hold their positions by *appointment.* It noted that while Congress had granted appointed exchange employees many of the privileges enjoyed by appointed federal employees, under 5 U.S.C. 2105(c) it had expressly excluded them from the coverage of the Back Pay Act. 427 U.S. at 128. The Court also noted that when Congress amended the Tucker Act in 1970 it did not change any of the provisions of the United States Code dealing with exchange employees nor did it require that the exchanges employ all persons pursuant to contract. 427 U.S. at 129. The only reasonable implication that can be drawn from the Court's analysis and disposition in *Hopkins* is that if Hopkins were found on remand to be an "appointed" employee, rather than a service contract employee, there was no contractual relationship on which Tucker Act jurisdiction could be based. *Hopkins* thus leaves no room for the court of appeals' theory that although "the *commencement* of [respondent's] employment [was] pursuant to 'appointment,'" his continued employment was governed by an implied-in-fact contract that the AAFES would adhere to its regulations in its dealings with him (App. A, *infra*, 8a).[8]

[8] *Hopkins* was subsequently settled by the parties prior to the Court of Claims' decision on remand. However, the Court of Claims has since decided two cases in accordance with the teachings of this Court's decision in *Hopkins.* In *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976), a discharged AAFES employee sued for back pay. While recognizing that the employee could have held his position either by appointment or by contract, the Court of Claims concluded that since the complaint had averred no facts that established a contract relationship, the court was without jurisdiction to entertain the suit. See also *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977).

2. Moreover, the court of appeals' ruling that the AAFES' failure to follow its own regulations in discharging respondent affords a basis for seeking money damages under the Tucker Act is also incompatible with this Court's decision in *United States* v. *Testan*, *supra*. In *Testan*, two Department of Defense trial attorneys claiming that their positions had been erroneously classified under pertinent Civil Service regulations sued the United States in the Court of Claims for money damages for the period of their allegedly wrongful classifications. They argued that "the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages." 424 U.S. at 400. This Court, however, rejected that argument. It held that the Tucker Act is merely jurisdictional and does not create any substantive right enforceable against the United States, and that none of the statutes that the plaintiffs claimed had been violated by their allegedly improper classifications contained an express provision for an award of monetary relief to a person who has been erroneously classified. Subsequently, in *Hopkins*, the Court noted that Hopkins' alternative contention that he had an enforceable claim under the Tucker Act because his discharge was in violation of both executive regulations and due process principles was directly foreclosed by *Testan*. 427 U.S. at 130. In light of the ruling in *Testan*, it is not sufficient under the Tucker Act for a plaintiff such as respondent to claim that he was deprived of a right granted by a constitutional provision, a statute or a regulation; the provision upon which the claim is founded must create a substantive right to monetary compensation from the United States.

By resorting to the fiction of an "implied-in-fact" contract, the court of appeals in the instant case has permitted respondent to bring a monetary claim against the AAFES under the Tucker Act premised solely upon allegations that in discharging respondent the AAFES failed to adhere to its own procedural regulations governing employee discharges. This approach cannot be reconciled with the Court's admonition in *Testan* that "the grant of a right of action must be made with specificity." 424 U.S. at 400. The jurisdictional grant in the Tucker Act amendment is limited to "express or implied contract[s]" with the military exchanges; that provision cannot logically be read more broadly than the jurisdictional grant construed in *Testan*, which permits the Court of Claims to entertain suits against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," as well as upon "any express or implied contract with the United States." 28 U.S.C. 1491. Thus, if, as the Court held in *Testan*, an agency's alleged violation of its employment regulations does not state a cause of action cognizable under the Tucker Act where appointed federal employees are concerned, it follows that a military exchange's alleged violation of its employment regulations does not state a cause of action cognizable under the Tucker Act amendment where appointed exchange employees are concerned.

To be sure, the court of appeals construed respondent's complaint as alleging a breach of an implied-in-fact contract, whereas the plaintiffs in *Testan* did not rest their claims on a contract theory. 424 U.S. at 400. But, as we have already shown (see pages 8-9, *supra*), the decision in *Hopkins* precludes respondent from asserting a cause of action in contract

against the United States for money damages based on an allegedly wrongful discharge.

In any event, from the standpoint of Tucker Act jurisdiction, the AAFES regulations that the court below construed to establish an "implied-in-fact" contract are subject to the same fatal flaw as the Classification Act and Back Pay Act provisions considered in *Testan*. The regulations prescribe procedures to be followed by the AAFES in the hiring and firing of its employees, but they do not provide that the AAFES will be liable in damages for any failure to abide by the prescribed procedures. An "implied-in-fact" contract, as the court of appeals recognized (App. A, *infra*, 8a-9a, quoting *Porter* v. *United States*, 496 F.2d 583, 590 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975)) is one "founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of their surrounding circumstances, their tacit understanding." No "tacit understanding" to the effect that employees discharged in contravention of AAFES regulations will be entitled to back pay and other monetary relief can be inferred from the AAFES regulations in question.[9] Moreover, any such understanding is negated

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[9] The court of appeals cited only one case—*Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 521 (5th Cir. 1948)—as direct authority for the proposition that the AAFES regulations were part of an implied-in-fact contract between respondent and the AAFES that gave respondent the right to sue for damages under the Tucker Act (App. A, *infra*, 8a). But in that case, which was decided prior to *Testan*, the regulations in question expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conservation and Domestic Allotment Act. The court in *Aycock-Lindsey* did not suggest that a Tucker

by the statutory exception of AAFES employees from the coverage of the Back Pay Act effectuated by 5 U.S.C. (Supp. II) 2105(c) (see page 6 and note 5, *supra*). The court of appeals' holding that a discharge in violation of AAFES regulations creates a cause of action for breach of an implied-in-fact contract cognizable under the Tucker Act amendment is therefore clearly wrong.[10]

In sum, if the court of appeals' decision is permitted to stand, it will render the United States liable for monetary claims by numerous appointed military exchange employees even though there is no evidence that Congress, in amending the Tucker Act, consented to suit on such claims.[11] Because the decision below

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Act remedy on an implied-in-fact contract theory could be based on an agency's failure to abide by regulations that made no reference to money payments.

[10] In addition, the court's reliance (App. A, *infra*, 9a) on the equitable principle that "a federal agency is bound to follow its regulations where the rights of individuals are affected" is misplaced. It is well settled that the right to sue the United States under the Tucker Act on a contract claim must rest upon the existence of a contract express or implied in fact, and not on a contract based merely on equitable considerations and implied in law. See, *e.g.*, *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287, 293 (1928); *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926).

[11] The number of persons employed by the military exchanges is substantial. In 1969, for example, the AAFES ranked third in total merchandising operations behind Sears, Roebuck & Company and J.C. Penney Company, with sales in excess of $3.5 billion. In 1976, AAFES had more than 3,000 retail outlets and more than 10,000 other types of facilities, including auto repair, customer service, vending fa-

is directly contrary to this Court's rulings in *United States* v. *Hopkins*, *supra*, and *United States* v. *Testan*, *supra*, we believe that summary reversal is appropriate.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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cilities and movie theaters. See *Champaign-Urbana News Agency, Inc.*, v. *J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980).

APPENDIX A

No. 79-1471

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

*v.*

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

June 27, 1980

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Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

The sole issue on this appeal is whether the district court has been vested with subject matter jurisdiction to adjudicate a suit filed by Arthur Sheehan against the Army and Air Force Exchange Service ("AAFES") based upon wrongful discharge from employment. The lower court dismissed for want of subject matter jurisdiction. We reverse and remand because we are persuaded that the lower court did not lack jurisdiction.

I. *The Facts and Procedural Posture*

On March 16, 1976, Sheehan was an employee of the AAFES serving as Shopping Center Manager for

the Fort Jackson Exchange in South Carolina. On that date, he received advance written notice of separation based upon conduct off the job that allegedly reflected discredit on the AAFES and that rendered his retention incompatible with the best interests of the AAFES. The letter was signed by James Stapleton, General Manager of the Piedmont Area Exchange, but since Sheehan was then serving in a special program identified as the Executive Management Program ("EMP"),[1] prior approval for the dismissal was obtained from the Commander of the AAFES, General Hospelhorn.[2] Sheehan's written re-

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[1] The EMP is intended to fulfill the continuing requirements of the AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of the AAFES. EMP employees incur special obligations and enjoy specific benefits not available to non-EMP employees of the AAFES. Army Reg. 60-21/Air Force Reg. 147-15 ("AR 60-21/AFR 147-15"), c. 5, § II, ¶¶ 5-6, 5-9 (Nov. 12, 1974). One of the benefits enjoyed is longer notice periods, based upon length of service, in the case of certain separations. *Id.* at ¶ 5-9, Appendix.

[2] The regulations regarding authority to dismiss an EMP employee for cause are cumbrous, and are not the model of clarity. Exchange Service Bulletin ("ESB") No. 247 (July 2, 1975) ¶ 13 provides, in pertinent part:

> An employee may be separated for cause by the official with authority to separate the employee [AR 60-21/AFR 147-15 Section II, Chapter 1]. . . .

Chapter 1, Section II of AR 60-21/AFR 147-15 grants express authority to separate AAFES employees only on the basis of retirement, and this power is granted to the commander of the AAFES. AR 60-21/AFR 147-14, c. 1, § II, ¶ 1-9e. However, the Commander is also vested with the authority to develop personnel policies, *id.* at ¶ 1-9b, to administer the EMP program, *id.* at ¶ 1-9c, and to administer the

sponse to the March 16, 1976 letter proved ineffective and Stapleton signed a letter of final termination dated April 16, 1976. Sheehan pursued administrative appeal[3] and convinced the hearing examiner that his conduct had not reflected discredit on the AAFES and that his retention was not contrary to

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AAFES program worldwide, *id.* at ¶ 1-9d. Presumably, these powers include dominion over the discharge of EMP employee of the AAFES. This interpretation is reinforced by the definitional section of ESB No. 247. Paragraph 7n of that Bulletin provides, in relevant part:

> n. Management official: Except as provided below, the management official is the official with authority to separate at the AAFES organizational element . . . to which the employee is assigned.
>
> (1) If the employee is an EMP employee . . . who is . . . separated by the Commander, AAFES, the management official is the Commander AAFES.

The Commander is likewise empowered to delegate his authority in writing. AR 60-21/AFR 147-14, c. § II, ¶ 1-10.

A redelegation of power to dismiss EMP employees had apparently already been authorized because ¶ 7c(3) of ESB No. 176 (July 29, 1974), which was signed on behalf of the Commander, provides, in pertinent part:

> Proposed involuntary separations of all Executive Management Program (EMP) employees . . . that are not initiated by the Commander, AAFES, will be subject to the *prior approval* of the Commander, AAFES . . . . (emphasis in original)

The necessity for obtaining the prior approval of the Commander of the AAFES, for involuntary dismissals of EMP employees when the discharge was not initiated by him, was reaffirmed less than a month after Sheehan received his letter of final termination. ESB No. 299 ¶ 8c(3) (May 10, 1976).

[3] ESB No. 247 ¶ 86 (July 2, 1975) permits appeal of separations for cause pursuant to ¶¶ 81-98 of that directive.

the best interests of the AAFES. However, the Commander of the AAFES, General Hospelhorn, acting in the capacity of Appellate Authority, disagreed with the hearing examiner and denied the appeal. He informed Sheehan that the decision was final and was not subject to further appeal or review. In January of 1978, Sheehan petitioned for reconsideration, but this effort eventually proved barren when the Chairman of the Board of the AAFES denied his appeal.

Relief was sought in the district court. The complaint alleged that Sheehan had been denied a free and impartial appeal, because General Hospelhorn gave prior approval for the discharge and also served as Appellate Authority in deciding Sheehan's administrative appeal, in derogation of AAFES regulations[4] and procedural due process. General Hospelhorn's decision in denying the appeal was also assailed as arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, in excess of statutory authority, and contrary to Sheehan's constitutional rights. Sheehan's prayer for relief sought reinstatement; back pay; other concomitants of employment, including accrued vacation time, sick leave, and retirement benefits; expenses incurred in seeking alternative employment; damages for mental anguish; punitive damages; court costs; and attorney fees.

The district court ruled that it lacked subject matter jurisdiction and granted the AAFES' motion to

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[4] ESB No. 247 ¶ 97a (July 2, 1975) provides that, ordinarily, the Commander of the AAFES is to serve as Appellate Authority. However, when he is the management official, *see* note 2, *supra*, the Appellate Authority is to be the Chairman of the Board of Directors, Army and Air Force Exchange and Motion Picture Services.

dismiss. On appeal, Sheehan argues that the court had jurisdiction under 28 U.S.C. §§ 1331(a), 1346(a)(2), and 1361 (1976). For the reasons stated below, we think the court possessed subject matter jurisdiction.

## II. *The Jurisdictional Problem*

Subject matter jurisdiction in the federal court ordinarily involves an examination of the constitutional limitations in Article III and congressional statutory grants of power. When suit is brought against the federal government, however, sovereign immunity, unless waived, operates as a bar to the action in the nature of an additional limitation on the court's subject matter jurisdiction. *United States* v. *Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 587-88, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941). A suit against the AAFES is considered a suit against the United States because this nonappropriated fund instrumentality[5] is an "arm[] of the government deemed by it essential for the performance of governmental functions . . . and partake[s] of whatever immunities it may have under the constitution and federal statutes." *United States* v. *State Tax Commission of Mississippi*, 421 U.S.

[5] A nonappropriated fund instrumentality is one that does not receive its monies by congressional appropriation. *United States* v. *Hopkins*, 427 U.S. 123, 125 n.2, 96 S.Ct. 2508, 2510, 49 L.Ed.2d 361 (1976). The AAFES was created and is administered under the general authority vested in the Secretaries of the Army and Air Force by 10 U.S.C. §§ 3012 and 8012 (1976). Absent special legislation, however, the federal government does not assume the obligations of the exchange services in the manner that contracts entered into by appropriated fund agencies are assumed. *Hopkins*, 427 U.S. at 127, 96 S.Ct. at 2511.

599, 606, 95 S.Ct. 1872, 1877, 44 L.Ed.2d 404 (1975); *see Young* v. *United States*, 498 F.2d 1211, 1215 (5th Cir. 1974); *cf. Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170, 86 L.Ed. 1611 (1942) (nonappropriated fund post exchanges are arms of the government). Because no constitutional infirmity to the assumption of jurisdiction is implicated here, we turn our attention to statutes which bestow subject matter jurisdiction in the traditional sense and those that waive sovereign immunity.

## III. *The Tucker Act*

28 U.S.C. § 1346(a)(2)[6] confers subject matter jurisdiction on the district courts in civil actions against the United States, where the amount claimed does not exceed $10,000,[7] and that, *inter alia*, are

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[6] That section provides, in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

[7] Actions seeking more than $10,000 in damages lie within the exclusive jurisdiction of the Court of Claims. *A. L. Rowan & Son, General Contractors, Inc.* v. *Department of Housing and Urban Development*, 611 F.2d 997, 999 (5th Cir. 1980); *Jones* v. *Alexander*, 609 F.2d 778, 780 (5th Cir. 1980). Although Sheehan did not limit his prayer for mone-

founded upon an express or implied contract with the federal government. The 1970 amendment to this statute provides that for purposes of the statute, express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES, are considered to be express or implied contracts with the United States. This section also operates as a waiver of sovereign immunity for the enumerated genre of suits. *A. L. Rowan & Son, General Contractors, Inc.* v. *Department of Housing and Urban Development*, 611 F.2d 997, 999 (5th Cir. 1980).

Sheehan argues that an implied contract of employment existed between the AAFES and himself. The AAFES counters with the argument that gov-

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tary relief to $10,000, during oral argument his counsel moved to amend the complaint and to waive any request for relief in excess of that sum. No objection was entered on behalf of the AAFES.

Although a complaint is fatally defective unless it contains a proper allegation limiting the recovery sought, *see Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975), defective allegations of jurisdiction may be amended on appeal. 28 U.S.C. § 1653 (1976). We have said that this statute is to be liberally construed. *McGovern* v. *American Air Lines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975) (per curiam); *accord Miller* v. *Davis*, 507 F.2d 308, 311 (6th Cir. 1974). Permitting amendment at this stage merely avoids a perfunctory refiling of another complaint which limits the request for monetary relief to $10,000. Time and expense for the parties and labor for court personnel are minimized. *See Mathews* v. *Diaz*, 426 U.S. 67, 75 & n.9, 96 S.Ct. 1883, 1889, 48 L.Ed.2d 478 (1976); *Schlesinger*, 420 U.S. at 744 n.9, 95 S.Ct. at 1306; *Willingham* v. *Morgan*, 395 U.S. 402, 407-08 & n.3, 89 S.Ct. 1813, 1816-17, 23 L.Ed.2d 396 (1969); *Jones*, 609 F.2d at 780-81 (uncontested amendment to complaint under Tucker Act permited on appeal).

erning regulations[8] establish beyond cavil that he served as an appointed employee and did not toil pursuant to contract. We note that although the complaint does not, by its terms, refer to an implied contract, it does charge that the administrative appellate procedure afforded Sheehan, subsequent to his discharge, did not comport with applicable regulations.

Even if the regulations label the *commencement* of Sheehan's employment as pursuant to "appointment," we do not think that ends the inquiry. Other regulations provide that an AAFES employee may be separated for cause only under certain conditions and provide for administrative appeal from the separation decision.[9] These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him. *See Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 520-21 (5th Cir. 1948); *cf. Bodek* v. *Department of Treasury*, 532 F.2d 277, 279 n.7 (2d Cir.) (per curiam), *cert. denied*, 429 U.S. 849, 97 S.Ct. 137, 50 L.Ed.2d 122 (1976) (validly enacted regulations are implied part of an express contract). A contract implied-in-fact is one "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of their surrounding circumstances, their tacit understanding." *Porter* v. *United States*, 496

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[8] The AAFES points to AR 60-21/AFR 147-15, c. 2, § I; c. 5, § II (Nov. 12, 1974).

[9] ESB No. 247 ¶¶ 13, 27, 81-98 (July 2, 1975).

F.2d 583, 590, 204 Ct.Cl. 355 (1974), *cert. denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975). That understanding was reinforced by the well-established legal principle that a federal agency is bound to follow its regulations where the rights of individuals are affected. *E.g. Morton* v. *Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959).

The allegation that the discharge violated controlling regulations was, therefore, equivalent to an allegation of breach of an implied-in-fact contract. Such a claim is sufficient to avoid dismissal on jurisdictional grounds. *United States* v. *Hopkins*, 427 U.S. 123, 130, 96 S.Ct. 2508, 2512, 49 L.Ed.2d 361 (1976). Accordingly, the lower court should not have dismissed the suit; it had power to hear the dispute and to award monetary relief pursuant to section 1346 (a)(2).

Section 1346(a)(2) does not, however, confer subject matter jurisdiction on the district court to award nonmonetary cure. *E.g., Lee* v. *Thornton*, 420 U.S. 139, 95 S.Ct. 853, 43 L.Ed.2d 85 (1975); *Jones* v. *Alexander*, 609 F.2d 778, 781 (5th Cir. 1980).[10]

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[10] Some circuit courts have intimated that the district courts may have jurisdiction under section 1346(a)(2) to award equitable relief in the narrow circumstance where it is merely incidental to and in aid of a primary request for monetary succor. *Werner* v. *United States Department of Interior, Fish and Wildlife Service*, 581 F.2d 168, 171 (8th Cir. 1978); *Larionoff* v. *United States*, 533 F.2d 1167, 1181 (D.C.Cir. 1976); *aff'd* 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). Assuming *arguendo* that such an exception does obtain, it is inapplicable because the principal relief sought here is reinstatement and restoration of employment benefits. It cannot be said that the nonmonetary remedy is merely incidental to or in aid of Sheehan's claim for monetary relief.

The source of that power must be found in other statutes.

IV. *General Federal Question Jurisdiction*

28 U.S.C. § 1331(a) (1976)[11] confers subject matter jurisdiction on the district courts for actions which arise under the Constitution and laws of the United States. Ordinarily, at least $10,000 must be at stake, but after the 1976 amendment to this statute, the monetary limitation does not pertain to suits against an agency of the federal government. Although the complaint did not specify this provision as a basis of jurisdiction, if the facts alleged meet the limitations, the lower court had jurisdiction notwithstanding the omission. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975).

Sheehan's complaint alleged procedural due process violations, arbitrary and capricious action constituting an abuse of discretion (presumably in contravention of substantive due process), and that Hospelhorn's denial of the appeal infringed other constitutional and statutory protections. The charge that appellate review by Hospelhorn violated governing regulations also arises under the "laws" of the United

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[11] That section provides:

(a) The district courts shall have original juridiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

States. *Chasse* v. *Chasen*, 595 F.2d 59, 61 (1st Cir. 1979); *Spencer* v. *Laird*, 442 F.2d 904, 906 (2d Cir. 1971); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 7-8 (3d Cir. 1964). Federal question jurisdiction under section 1331(a) is triggered by these allegations because they are not "*so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978), *quoting*, *Hagans* v. *Lavine*, 415 U.S. 528, 542-43, 94 S.Ct. 1372, 1381-82, 39 L.Ed.2d 577 (1974) (emphasis in the original).

Nevertheless, section 1331(a) is not a waiver of sovereign immunity. *Beale* v. *Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972). Sheehan must look to 5 U.S.C. § 702 (1976)[12] for the waiver. The 1976 amendment

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[12] That section provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

to that statute waives sovereign immunity for actions against federal government agencies, seeking non-monetary relief, if the agency conduct is otherwise subject to judicial review.

We are cognizant of the fact that the Second Circuit has recently held that section 702 does not waive the bar of sovereign immunity for nonstatutory review of agency action under section 1331. *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978). Nevertheless, we find the illumination of the legislative history of section 702 by the Third Circuit in *Jaffee* v. *United States*, 592 F.2d 712, 718-19 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979), cogent. We too must respectfully part with the Second Circuit and hold that Congress did intend to waive the defense of sovereign immunity for nonstatutory review under section 1331. *Accord, Collyard* v. *Washington Capitals*, 477 F.Supp. 1247, 1252-53 (D.Minn. 1979).

However, the AAFES argues that the 1970 amendment to 28 U.S.C. § 1346 (1976), which provided that express or implied contracts with the AAFES are to be considered as contracts with the United States, impliedly prohibits jurisdiction under 28 U.S.C. § 1331(a) (1976) and 5 U.S.C. § 702 (1976). It argues that in enacting that amendment, Congress believed that it was extending the sole vehicle for suit against the AAFES. Reliance is then placed on *Brown* v. *General Services Administration*, 425 U.S. 820, 828-29, 96 S.Ct. 1961, 1965-66, 48 L.Ed.2d 402 (1976), and other cases, for the proposition that this

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(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

belief, even if erroneous, impliedly prohibits relief under clause (2) in section 702.

We do not find this argument persuasive. The AAFES has not pointed us to any authority that indicates that Congress' purpose in enacting the 1970 amendment was to provide the only method for suing the AAFES. Indeed, *Hopkins*, 427 U.S. at 125, 96 S.Ct. at 2510, states that the purpose was to clarify that the fact that the government has not assumed the obligations of the enumerated nonappropriated fund instrumentalities does not prevent suit against them from being suits against the United States. Thus, after *Hopkins* it was clear that actions for breaches of contract seeking monetary relief were to be cognizable in the Court of Claims (and in the district courts if the sum involved did not exceed $10,000). But, we have no indicia of congressional belief regarding the maintainability of suits against AAFES for *nonmonetary* relief at the time the amendment was before Congress. Consequently, we do not find the enactment to be preclusive under a *Brown* syllogism.

It is clear that the legislative history to section 702 indicates that Congress did not intend to expand the waiver of sovereign immunity in the Tucker Act.[18]

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[18] H.R. Rep. No. 1656, 94th Cong., 2 Sess. 12-13, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6121, 6133 indicates that:

> Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for con-

When suit is premised solely on that Act, section 702 cannot expand the jurisdiction and waiver under 28 U.S.C. § 1346(a)(2) to permit the award of nonmonetary relief in the district court. Conversely, when suit is brought under statutes other than the Tucker Act seeking a nonmonetary remedy for violation of the national Constitution and laws, the limited grant of jurisdiction and waiver of sovereign immunity found in that Act does not expressly or impliedly prohibit the suit. *See Neal* v. *Secretary of Navy*, 472 F.Supp. 763, 773-75 (E.D. Pa. 1979).[14]

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tract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims. (footnotes omitted).

[14] *Lee* v. *Blumenthal*, 588 F.2d 1281 (9th Cir. 1979) and *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932-34 (2d Cir. 1978) may conflict, to a certain extent, with this view. Those cases involved suits seeking to compel the government to redeem "Flower Bonds." However, the value at stake in both those cases far exceeded the $10,000 limitation on jurisdiction in the district courts under § 1346(a)(2). A suit seeking a judgment for damages for breach of the bond contract, which would have been functionally equivalent to a judgment ordering redemption, would have to have been brought in the Court of Claims. Exercise of jurisdiction on those facts would have the pernicious effect of undermining the exclusive jurisdiction of the Court of Claims. *Cf. Carter* v. *Seamans*, 411 F.2d 767, 774-75 (5th Cir. 1969), *cert. denied* 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970). (Declining to exercise

In this instance, nonmonetary relief is available under a jurisdictional grant in 28 U.S.C. § 1331(a), and that statute is not a waiver of sovereign immunity and contains no express or implied interdiction against nonmonetary relief.

V. *Mandamus*

28 U.S.C. § 1361 (1976)[15] confers subject matter jurisdiction for actions in the nature of mandamus to compel a federal agency to perform a duty owed to the plaintiff. The statute is also a waiver of sovereign immunity. *Huffstutler* v. *Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979) (per curiam); *Beale*, 461 F.2d at 1138.

Three elements must exist, however, before mandamus is appropriately exercised: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available. *Jones*, 609 F.2d at 781; *Winningham* v. *United States Department of Housing and Urban Development*, 512 F.2d

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mandamus jurisdiction so as not to interfere with the exclusive jurisdiction of the Court of Claims). In fact, in *Lee*, one of the reasons articulated for the reluctance "to accept this action as pleaded" was the equivalence of the remedies of damages and an order to redeem.

[15] That section provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

That this section cannot serve as a jurisdictional basis for Sheehan's unliquidated monetary claim is evident from *Spaulding* v. *Nielsen*, 599 F.2d 728, 730 (5th Cir. 1979) (per curiam).

617, 620 (5th Cir. 1975). With regard to this final factor, the alternative remedy must be capable of affording full relief as to the subject matter in question. *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970). Since we hold that Sheehan can maintain his suit for both monetary and nonmonetary relief under alternative statutes, the lower court did not possess mandamus jurisdiction.

VI. *Summary*

We have concluded that the district court possesses subject matter jurisdiction to decide this controversy. Power to provide monetary relief is found in the Tucker Act, 28 U.S.C. § 1346(a)(2), and authority to award nonmonetary compensation flows from the confluence of 28 U.S.C. § 1331(a) and 5 U.S.C. § 702. This holding precludes the existence of mandamus jurisdiction in the district court. We travel no further and should not be understood to intimate any opinion on the merits.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

*v.*

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT

[Filed Jan. 15, 1979]

ORDER

CAME ON for consideration this date, Defendant's Motion to Dismiss or In the Alternative for Summary Judgment in the above styled and numbered cause, and after carefully reviewing the administrative record herein as well as the pertinent authorities advanced by the Defendant in support of its Motion to Dismiss,

IT IS ORDERED that Defendant's Motion to Dismiss be and the same is hereby granted for the reason that the Court finds and concludes as a matter of law, pursuant to Federal Rule of Civil Procedure, Rule 12(b) that the Court lacks subject matter jurisdiction over the instant action. Accordingly the above-styled and numbered cause is ordered dismissed and is to be removed by the Clerk from the docket of this Court.

SIGNED on January 15, 1979.

/s/ Robert W. Porter
United States District Judge

APPENDIX C

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 79-1471

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D. C. Docket No. 3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

*versus*

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order

of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 27, 1980

Issued as Mandate: Jul. 23, 1980.

Reissued as Mandate: October 8, 1980.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1471

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

*versus*

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

[Filed Sep. 26, 1980]

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Opinion 6-27-80, 5 Cir., 198—, —— F.2d ——)

(September 26, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit

Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

Form 704-2

## APPENDIX E

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (NOVEMBER 12, 1974) provides in pertinent part:

* * * * *

**1-7. Status of employees.** *a.* AAFES personnel are Federal employees of an instrumentality of the United States within the Department of Defense.

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**1-9. Personnel authority.** *a.* The authority to establish personnel policy is vested in the Board of Directors, Army and Air Force Exchange and Motion Picture Service, hereinafter referred to as the Board of Directors.

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*f.* The authority to appoint and promote AAFES employees with or to grades designated above USP 15 is vested in the Board of Directors.

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*g.* Authority must be exercised in accordance with this regulation and procedures published by the Commander, AAFES.

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**2-2. Appointment criteria.** *a.* To be considered for appointment, an individual must submit a complete and accurate application for employment reflecting that the individual meets the minimum requirements for the position under consideration.

* * * * *

**2-3. Appointment.** *a.* After selection of an individual for appointment, but prior to official appointment, each individual must submit the following:

(1) Evidence that he is in satisfactory physical condition, if requested. The appointing authority may, if he deems it advisable, require a medical certification or physical examination at AAFES expense.

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*c.* Official appointment will be effective upon issuance to the individual of a copy of a properly executed AAFES personnel action. The effective date of appointment will be the date indicated on the personnel action.

*d.* Appointments are considered probationary for the periods specified below and these periods may not be extended.

(1) Positions paid under the Universal Salary Plan, management trainee program and college trainee program—1 year.

(2) All other positions—90 days.

*e.* Employees will not be appointed to part-time, temporary or on-call employment for the purpose of determining the employee's suitability for regular full-time employment.

*f.* Employees will be appointed to step 1 of the grade assigned to the position the employee will occupy, except that:

(1) Employees with special qualifications or experience may be appointed to step 2.

(2) Employees who will require further training may be assigned to a lower grade, in accordance with the provisions on training assignment in section I, chapter 4.

(3) Upon specific approval by the Commander, AAFES, an employee can be appointed to a step higher than step 2.

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**2-12. Employee utilization, payment, and benefits.** *a.* Regular full-time, regular part-time, temporary full-time, temporary part-time, and on-call employees will be utilized to perform approved standard and non-standard jobs. Casual employees may be utilized to fill unskilled non-recurring jobs.

*b.* Payment may be made—

(1) In accordance with the Universal Salary Plan, Hourly Pay Plan, or Commission Pay Plan for all employees, except casual employees. To regular part-time employees, in accordance with the Universal Salary Plan, if approved by the Commander, AAFES.

(2) In accordance with the terms of the contract when the employee is hired pursuant to an employment contract.

* * * * *

**3-4. Verbal reprimand.** *a.* A verbal reprimand may be given by the employee's supervisor based upon any of the following:

(1) Failure to adequately perform his job as set out in the employee's job description.

(2) Conduct on the job involving insubordination, violation of laws, regulations, rules or procedures, or other conduct incompatible with maximum employee efficiency.

(3) Conduct off the job reflecting discredit on AAFES.

* * * * *

**3-8. Separation for cause.** An employee may be separated for cause (sec. II, this chap.) by the official with authority to separate the employee (sec. II, chap. 1) on the basis of conduct specified in paragraph 3-4*a*(2) or (3) when—

*a.* Other disciplinary actions and/or counseling are determined to be inappropriate, or

*b.* Other disciplinary actions and/or counseling have been utilized without apparent success, and

*c.* The act of misconduct or delinquency is of such a nature or so repetitious that retention of the employee in any capacity is determined to be incompatible with the best interests of AAFES.

* * * * *

EXCHANGE SERVICE BULLETIN NO. 247 (15-52) (JULY 2, 1975) provides in pertinent part:

* * * * *

ADVERSE ACTIONS AND ADMINISTRATIVE APPEALS

81. The provisions of this directive pertaining to adverse actions and administrative appeals apply to regular full-time and regular part-time employees.

82. The advance notice of an adverse action will be in writing and will:

a. Identify the specific adverse action contemplated.

b. State the effective date of the action contemplated, which will be no earlier than 30 calendar days following the employee's receipt of the advance notice.

c. State specifically and in detail the reasons for the adverse action contemplated, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

d. Advise the employee of his right to reply, orally, and/or in writing, and to submit affidavits in support of his reply. The employee will be afforded an opportunity to be accompanied by a representative during his oral reply if he so requests. Any expenses involved in making an oral reply will be borne by the

employee. He will be permitted to make any presentations he feels are relevant and should be considered before the final decision. The right of reply does not include the right to a hearing with testimony from witnesses for both sides of the controversy, but is an opportunity for refutation of the advance notice. When a reply is made orally, a written record will be made and, if possible, the signature of the employee will be added as an indication that he agrees with its accuracy.

e. Identify the official to receive the written or oral reply.

f. Advise the employee that the reply must be filed within five workdays of receipt of the advance notice of the proposed action but that, upon good cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed 10 workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Advise the employee that his reply to the advance notice of adverse action will be given full consideration before a final decision is made.

h. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a written final decision will be made following expiration of the authorized reply period.

83. Within 10 workdays of receipt of the employee's reply and after giving full consideration of the employee's reply or, if no reply is received, on the day following expiration of the authorized reply period, the official taking the action will make a final

decision. If the decision is to withdraw the action, the employee will be notified in writing. If the decision is adverse to the employee, whether it is to take the same action originally contemplated or a less severe action, the employee will be advised of the action to be taken. (If the official taking the action has made a decision to impose a less severe action, a new advance notice is not necessary.) The final decision will be in writing and will:

a. Reference the advance notice of adverse action.

b. Advise the employee, if a reply was received, that full consideration was given to his oral and/or written reply; or if no reply was received, state that no reply was received.

c. State the action to be taken and the paragraph of this directive under which it is being taken.

d. State the basis for the action and which of the reasons in the advance notice of proposed action were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

e. State the effective date of the action (which must be at least 30 calendar days from the date the employee received the advance notice of the action).

f. State that this is the official's final decision.

g. State that, within 21 calendar days of the receipt of the final decision, the employee may initiate, under the provisions of this directive, an appeal of the action taken. Any appeal submitted must contain a statement that the employee either does or does not desire an evidentiary hearing. The employee should also be advised that assistance on the format and procedures involved in filing the appeal may be obtained from the servicing personnel office.

h. Advise the employee of his right to be represented by counsel or any other individual secured by the employee at his expense in presentation of his appeal.

84. The final decision will be furnished the employee by one of his supervisors. The time and date of delivery will be noted on a copy to be retained by the official making the final decision. If the employee is absent, the final decision will be sent to him at the last-known address by certified mail, return receipt requested.

85. An appeal from a final decision must be submitted within 21 calendar days of the employee's receipt of the written final decision. Upon request, the appellant will be provided assistance by the servicing personnel office in preparing a written appeal. Neither the appellant nor his representative will be intimidated or coerced in an effort to discourage the appellant from exercising his right to appeal, nor will an appellant or his representative be discriminated against or reprisals be taken because of the exercise of such right. If the appellant chooses to be represented by an AAFES employee, and if the employee selected by the appellant consents and is determined, by appropriate authority, to be reasonably available, such employee will be made available. If an AAFES employee is so designated, he may have reasonable time off from his duties for the purpose of representing the appellant. AAFES employees assigned to the office of the General Counsel, to personnel duties, or to security duties may not serve as the appellant's representative. Appellants may not have more than two representatives including legal counsel. If the appellant has two representatives, one must be designated as his lead representative.

86. Disciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Suspension without pay for more than 30 calendar days.

b. Separation for cause.

c. Withdrawal of EMP status, except for declination of transfer or for unsatisfactory performance.

87. Nondisciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Downgrade or reduction in compensation except terminations of temporary promotions, terminations of details, or as a result of rehire.

b. Separation for RIF.

c. Separation for disability or for maternity.

d. Downgrade or reduction in compensation for unsatisfactory performance.

e. Withdrawal of EMP status for unsatisfactory performance.

f. Separation for unsatisfactory performance.

88. The adverse actions set out in paragraphs 86 and 87 above are the only adverse actions from which an employee may appeal under the procedures prescribed in paragraphs 81 through 98 of this directive. Except for the adverse actions set out in 87d, e and f above, appeals from nondisciplinary actions may be made only on the basis of procedural errors or discrimination, other than discrimination which would be a basis for consideration under equal employment opportunity procedures.

89. If an employee desires to appeal an adverse action, he must address his appeal to the appellate authority through the official making the final decision

and the management official, if they are not one and the same. The appeal may contain affidavits, documentary evidence and arguments in support of the employee's appeal; and must contain a statement that the appellant does or does not desire an evidentiary hearing. The name and address of the appellant's representative, if any, must also be stated in the written appeal. The appellant must state the basis for his appeal in sufficient detail to permit a hearing examiner to understand the basis. He must also state the remedy requested, which must be personal to him. The issues to be brought before a hearing will be limited to those set forth by the appellant in his written appeal; however, the appellant may, by letter received by the hearing examiner 10 or more workdays prior to the date set for the convening of the hearing on the appeal, amend his appeal to add new issues. A copy of any letter amending an appeal must also be sent to the management official at the same time it is mailed or delivered to the hearing examiner.

90. Upon receipt of an appeal from an adverse action, the management official will, within five workdays of receipt of the appeal, forward the entire file to the hearing examiner. The file forwarded will include the appeal, together with all evidence submitted by the appellant, the evidence upon which the final decision to take the adverse action was based, and a copy of the final decision notifying the appellant of the adverse action.

91. Upon receipt of an appeal from an adverse action, the hearing examiner will ascertain whether the appeal is in accordance with the requirements of paragraphs 81 through 98 of this directive. If it is ascertained that the appeal does not comply with these

requirements, the hearing examiner will return the appeal to the appellant with a written explanation as to why it was not accepted and, where applicable, refer to the paragraph or paragraphs of this directive that are the basis for not accepting the appeal. The appellant will be given five workdays from date of receipt of the hearing examiner's letter to resubmit his appeal. If the employee fails to resubmit his appeal within five workdays, the appeal will be considered withdrawn. The determination of the hearing examiner regarding acceptance of an appeal is final and not subject to further appeal or review. The determination of the hearing examiner will be forwarded through channels to the employee with a copy to the management official and to the official making the final decision.

92. If the employee does not affirmatively request an evidentiary hearing, a recommendation on the appeal may be rendered by the hearing examiner on the relevant evidence submitted. However, the hearing examiner may request additional evidence from either the appellant or the official making the final decision prior to making a recommendation.

93. If the employee affirmatively requests an evidentiary hearing or if the hearing examiner determines that an evidentiary hearing is necessary, a hearing will be conducted by a hearing examiner.

94. *Preparating* [sic] *for hearing.* The management official will select an individual to prepare and present the case for management. The appellant and the management official will notify the hearing examiner in writing of the names and addresses of their representatives in advance of the hearing.

a. The management official will provide facilities, including recording equipment and a court reporter

or stenographer, as determined necessary by the hearing examiner, and will perform other related functions as prescribed by the Commander, AAFES.

b. The hearing examiner is authorized to consult with the appellant and the management official and/or their representatives on an informal basis in advance of the hearing in order to clarify the issues, attempt an informal resolution, secure agreement as to certain undisputed facts, and attempt to narrow the issues to be considered during the hearing.

95. *Hearing examiners.* A hearing examiner will be responsible for establishing the date, time, and place of the hearing, and for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Such notice will include: the date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both the appellant and management to produce evidence in their behalf in documentary form, or by testimony of witnesses; a statement of the right of both the appellant and management to secure assistance and information from the servicing personnel office; and a statement advising the appellant of his right to have representation and his responsibility in arranging for that representation.

a. The hearing examiner will conduct the hearing in accordance with procedures prescribed and published by the Commander, AAFES. The functions of the hearing examiner are to identify the issues involved, to ascertain and acquire all relevant facts, to evaluate and weigh those facts, to make findings of fact, and to render a written recommendation on the appeal to the appellate authority. The hearing ex-

aminer will prepare a record of the hearing which will include a verbatim transcript or, at his option, a summarized record of the hearing, a statement of the issues involved, appropriate findings of fact and a written recommendation, including recommendations for corrective action where required.

b. Evidence introduced during the hearing will be limited by the hearing examiner to matters material and relevant to the appeal. Strict adherence to the formal rules of evidence will not be required.

c. When all evidence has been obtained, including that contained in the transcript of the hearing when a hearing is conducted, the appeal and evidence will be reviewed by the hearing examiner. Unless further evidence is required, the hearing examiner will make a written recommendation on the merits of the appeal and transmit it to the appellate authority. The hearing examiner may recommend modification, if appropriate, of any action which has been taken. The hearing examiner may recommend appropriate corrective action to facilitate implementation of the recommendation.

96. *Record of hearing.* The transcript of any hearing will be prepared in duplicate. The original will be forwarded to the hearing examiner who conducted the hearing and the duplicate will be forwarded to the management official. A copy will be made available, by the management official, for the use of the appellant. The hearing record will include as a minimum:

a. The request for a hearing.
b. Notice of the hearing.
c. The transcript of the hearing with exhibits.

d. The hearing examiner's report which will include:

(1) A statement of the issues.
(2) A statement of the findings of fact.
(3) The hearing examiner's recommendation.

97. *Appellate authority.* a. The appellate authority is the Commander, AAFES or, in his absence, the Deputy Commander, AAFES. However, if the Commander, AAFES is the management official, the appellate authority will be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services.

b. The appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination except that, when the Chairman of the Board of Directors is the appellate authority, he will secure the legal advice of the Judge Advocate General of the Army or of the Air Force, as appropriate, prior to rendering his determination.

98. *Determination by appellate authority.* The appellate authority will render a written determination on the appeal. The appellate authority may approve, disapprove, or amend the recommendation of the hearing examiner; return the case for further hearing; or return the case for corrective action. The written determination will, unless the hearing is to be reopened or unless other corrective action requiring further review is to be taken, include a statement that the determination by the appellate authority is final and not subject to further appeal or review.

a. One copy of the determination will be forwarded to each of the following: the appellant, the hearing examiner, the management official, and any intermediate headquarters, as appropriate.

b. In the event a rehearing or further review is ordered, processing of the appeal will continue in accordance with paragraphs 94 through 98, as appropriate.

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Office - Supreme Court, U.
FILED
APR 19 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1437

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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ARMY AND AIR FORCE EXCHANGE SERVICE,
*Petitioner*

v.

ARTHUR EDWARD SHEEHAN

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## JOINT APPENDIX

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PETITION FILED: FEBRUARY 23, 1981
PETITION GRANTED: OCTOBER 5, 1981

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RELEVENT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 1978 | |
| Feb 24 | Filed COMPLAINT (w/ Exhibits A-F) and Issued SUMMONS (4). |
| Mar 8 | Filed MARSHALS RETURN on SUMMONS executed 3-3-78 by serving Army & Air Force Exchange Service by delivery to Stephen N. Thompkins, attorney; by serving U.S. Attorney by delivery to Brenda Schreuders; and by serving Attorney General, Washington, D.C.—two copies by certified mail. |
| May 1 | Filed Defendant's ANSWER. |
| June 21 | ORDER SETTING CASE ON Non jury DOCKET Sept. 25, 1978 TO ATTORNEYS 6-21-78 RWP. |
| July 21 | Filed DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT. |
| July 21 | Filed MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, with attachments. (separate instrument) |
| Aug 18 | Filed PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT. |
| Sep 11 | Filed DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT THEREOF. |
| Sep 19 | Filed ORDER scheduling a hearing in this case on October 16, 1978 at 10:00 A.M.; all motions pending as of the date of this order will be considered. RWP copies mailed to counsel |
| Oct 17 | Filed ORDER that Plaintiff shall respond to Defendant's motion to dismiss or in the alternative for summary judgment no later than October 27, 1978. RWP copies mailed to counsel |

| DATE | PROCEEDINGS |
|---|---|

1978

Oct 27 Filed MEMORANDUM OF AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

Dec 1 Filed DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

1979

Jan 15 Filed ORDER granting Defendant's Motion to Dismiss for the reason that the Court lacks subject matter jurisdiction over the instant action; accordingly, this cause is ordered dismissed and is to be removed by the Clerk from the docket of this Court. WP
copies mailed to counsel

Feb 13 Filed NOTICE OF APPEAL by ARTHUR EDWARD SHEEHAN from Order Granting Defendant's Motion to Dismiss entered January 15, 1979.

Feb 14 Mailed copy of Notice of Appeal to 5th Circuit Court of Appeals together with docket entries; cy to Judge; cy to Court Reporter

Feb 14 Filed Plaintiff's NOTICE OF FILING CASH BOND ($250.00).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3-78-0222F

ARTHUR EDWARD SHEEHAN

*vs.*

ARMY & AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND THE AIR FORCE

[Filed Feb. 24, 1978]

## COMPLAINT

### JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 701-706, 28 USC §§ 1346(a)(2) and 1361, and the U.S. Constitution.

### PARTIES

2. Plaintiff Arthur Edward Sheehan (hereinafter sometimes referred to as "Sheehan") is a resident of Dallas County, Texas.

3. Defendant Army and Air Force Exchange Service (hereinafter sometimes referred to as "AAFES") is a non-appropriated funded government agency within the Department of Defense, and specifically under the direct control and jurisdiction of the Departments of the Army and the Air Force.

### FACTS

### COUNT ONE

4. On or about July 2, 1962, Plaintiff was first employed by AAFES as a Computer Programmer. In and about 1967, Sheehan was accepted into a special program

of AAFES known as the Executive Management Program (hereinafter sometimes referred to as "EMP").

5. As an EMP employee, Plaintiff had certain special obligations and special benefits different from other AAFES employees. Included within the benefits, inter alia, to EMP employees were:

1. Retention priority in reduction in force;
2. Longer notice periods based on length of service in case of certain separations;
3. Triple indemnity accidental death benefits and supplemental life insurance benefits in accordance with the AAFES Group Insurance Plan;
4. Supplemental Retirements Benefit; and
5. Retention of personal grade regardless of assignment.

Included within the obligations, inter alia, of EMP employees were:

1. Obligation to develop and improve abilities and efficiencies to the fullest extent practical in fulfillment of the purpose and principals of the program;
2. Obligation to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that the individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer;
3. Obligated to accept the terms of EMP early retirement.

6. When an employee, including an EMP employee, is terminated from AAFES, he is submitted to a procedure

commonly known as the "Separation Procedure." According to the rules and regulations of AAFES, the separated (terminated) employee has an automatic right of appeal to an Appellate Authority, the next highest management authority. The Appellate Authority is the individual(s) who review the evidence submitted at the separation hearing and during the appeal process to determine if the separation shall stand. According to AAFES rules and regulations the Appellate Authority cannot be the same as the Separation Authority.

7. One of the benefits of being an EMP employee and according to the regulations of AAFES is that the EMP program is administered specifically by the Commander of AAFES. In cases involving the separation (termination) of EMP employees, the Commander, AAFES, is the management official with the sole authority to authorize and approve of the separation of such EMP employee.

8. On November 18, 1975, Plaintiff was arrested for violation of state drug laws and on March 1, 1976, plead guilty to four misdemeanor offenses of simple possession of illegal drugs.

9. By letter dated March 16, 1976, Plaintiff was given Advance Notice of Separation for Cause from AAFES. The management official in charge of such separation of Plaintiff was the Commander, AAFES. Attached hereto is Exhibit "A", and incorporated herein by reference for all purposes is the Advance Notice of Separation for Cause dated 16 March 1976. In particular, Paragraph 2 of said Advance Notice states:

> "This is to advise you that the commander, Army and Air Force Exchange Service (AAFES) has granted prior approval of your separation from employment with the AAFES for cause. . . ."

10. In accordance with the separation process and AAFES rules and regulations, the Commander conducted an investigation. Attached hereto as Exhibit "B", and

incorporated herein by reference for all purposes, is a copy of Defendant's memorandum dated 5 February, 1976. In particular, Paragraph 4 states:

> "An investigation of the Arthur Sheehan case is presently being conducted by the Commander, AAFES. . . ."

11. The Commander, AAFES, authorized his agent, James J. Stapleton (hereinafter referred to as "Stapleton"), General Manager of Piedmont Area Exchange, to proceed with the Separation for Cause of Plaintiff. Attached hereto as Exhibit "C", and incorporated herein by reference for all purposes, is Stapleton's memorandum dated 13 April 1976, notifying the Chief of Staff, Fort Jackson, South Carolina, of Stapleton's authority to act on behalf of the Commander AAFES.

12. Attached hereto as Exhibit "D", and incorporated herein by reference for all purposes, is the letter of Final Decision to Separate Plaintiff dated 14 April, 1976, Establishing the effective date of Plaintiff's separation as the close of business of 19 April, 1976. In particular, such letter states:

> "The basis of your separation is conduct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. . . ."

13. In accordance with the appellate procedure of AAFES, Plaintiff appealed. This matter was heard before a hearing examiner, Mr. R. J. Birkmeyer (hereinafter sometimes referred to as "Birkmeyer"), an attorney employed by AAFES. Attached hereto as Exhibit "E", and incorporated herein by reference for all purposes, is a copy of the decision of Birkmeyer styled Appeal of Adverse Action—Mr. Arthur E. Sheehan and dated 18 November, 1976.

14. Birkmeyer found, inter alia:

1. Plaintiff's conduct off the job did not reflect discredit on AAFES; and
2. Plaintiff's retention in some capacity was not compatible with the present interest of AAFES.

15. Among the recommendations made by Birkmeyer were:

1. Plaintiff was denied lack of administrative due process;
2. Plaintiff be reinstated with back pay to his former grade and transferred to an assignment outside the Southeast Exchange Region; and
3. That if the Commander determines the action inappropriate, that the matter be heard by the Appellate Authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

16. Recommendation number 3, Paragraph 15 *supra*, was based on AAFES regulations which provide that if the Commander, AAFES, is the Separation Authority, that the Appellate Authority will be the Chairman of the Board of Directors of AAFES.

17. In Plaintiff's case, the Appellate Authority was not the Chairman of the Board of Directors of AAFES but in fact was the Commander, AAFES, the same individual who originally separated Plaintiff.

18. The actions of the Commander in acting as both the Separation Authority and the Appellate Authority violated AAFES regulations and Plaintiff's right to a free and impartial appeal. Such actions on the part of the Commander, AAFES, denied Plaintiff due process.

19. In the alternative, Plaintiff would show that if such procedure is permitted and sanctioned by AAFES, then such action is unlawful and denies Plaintiff a fair and impartial hearing and due process of law.

20. As a result of the aforesaid actions by the Commander, AAFES, and AAFES, Plaintiff has suffered substantial damages including the following:

1. Lost wages in the amount that Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;
2. All other benefits, including accrued vacation, sick leave, and all retirement benefits;
3. Plaintiff was forced to move to seek employment elsewhere and incurred substantial expenses in attempting to find other employment;
4. Emotional stress and mental anguish.

21. The actions on the part of Defendant was willful and malicious and Plaintiff was forced to retain counsel to seek redress. As a result Plaintiff has incurred substantial attorney fees for which Defendant should pay as part of punitive damages.

## COUNT TWO

22. Plaintiff hereby herein incorporates Paragraphs 1 through 21 as if fully set out herein.

23. Attached hereto as Exhibit "F", and incorporated herein by reference for all purposes, is the letter of C. W. Hospelhorn, Major General, U.S.A. Commander, dated 20 December 1976, advising Plaintiff that his appeal was denied and that Hospelhorn's decision was final and not subject to further appeal or review.

24. The decision denying Plaintiff's appeal was:

1. Arbitrary, capricious, an abuse of discretion, and not in accordance with law;
2. Contrary to Plaintiff's constitutional right, power and privileges;
3. In excess of statutory authority and short of statutory right;

4. Without observation of procedures required by law;
5. The decision of C. W. Hospelhorn was unsupported by substantial evidence, expecially in light of the findings of Birkmeyer; and
6. The actions of C. W. Hospelhorn and AAFES were unwarranted by the facts of Plaintiff's case.

25. As a result of the aforesaid actions by the Commander, AAFES, and AAFES, Plaintiff has suffered substantial damages including the following:

1. Lost wages in the amount that Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;
2. All other benefits, including accrued vacation, sick leave, and all retirement benefits;
3. Plaintiff was forced to move to seek employment elsewhere and incurred substantial expenses in attempting to find other employment;
4. Emotional stress and mental anguish.

26. The actions on the part of Defendant was willful and malicious and Plaintiff was forced to retain counsel to seek redress. As a result Plaintiff has incurred substantial attorney fees for which Defendant should pay as part of punitive damages.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays:

1. Defendant be cited to appear herein;
2. That upon final hearing hereof, Plaintiff have judgment against the Defendant for the difference in the wages Plaintiff should have received had he continued to be employed by Defendant less all monies earned by Plaintiff during the period since April 19, 1976;

3. That Plaintiff recover all other benefits, including accrued vacation, sick leave, and all other retirement benefits for which he would have been entitled;
4. That Plaintiff recover all costs and expenses he incurred in seeking employment elsewhere;
5. That Plaintiff recover damages for his mental stress and mental anguish;
6. That the Commander's decision to separate Plaintiff be set aside and Plaintiff reinstated in a position no lower than UA13 and reinstatement be at his former grade in accordance with Paragraph 29, Exchange Service Manual 15-5;
7. That Plaintiff recover punitive damages, attorney fees and court costs.

Respectfully submitted,

LAW OFFICES OF IRA E. TOBOLOWSKY

By /s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY
1900 Southland Center
Dallas, Texas 75201
214/742-9205

EXHIBIT "A"

SE-PIAX 16 March 1975

SUBJECT: Advance Notice of Separation for Cause

Mr. Arthur E. Sheehan

1. References:

a. Exchange Service Bulletin (ESB) No. 247, Personnel Relations, dated 2 July 1975.

b. Chapter 1, paragraph 1-3f(6), AR 600-50, Standards of Conduct.

c. Paragraph 1-14, Standards of Conduct, AR 60-21/AFR 147-15, Exchange Service Personnel Policies, 12 November 1974.

d. Report of Investigation No. 75-CID053-22675 from the Criminal Investigation Department, dated 30 January 1976.

2. This is to advise you that the Commander, Army and Air Force Exchange Service (AAFES), has granted prior approval of your separation from employment with the AAFES for cause. It is proposed that the separation will be effective 30 calendar days following your receipt of this advance notice. Your separation is in accordance with paragraph 13 of ESB 247, Personnel Relations, 2 July 1975, and paragraph 5-9e, AR 60-21/AFR 147-15.

3. The reason for your separation is conduct off the job which reflects discredit on the AAFES and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. The specific basis for this action is that on or about 17 November 1975, at Irmo, South Carolina, you had in your possession approximately: 334 Amphetamine tablets (a Schedule I substance), 11.5 grams of MDA (3, 4 Methylenedioxy Amphetamine—also a Schedule I substance), a quantity of PCP (Phencyclidine Hydrocloride), a Sched-

ule III substance, and 40 marijuana plants. The possession of these drugs and plants is in violation of Title 21, U.S. Code annotated, Section 844. Further, on 1 March 1976, in the Lexington County General Sessions Court, Lexington, South Carolina, you were found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. You were sentenced to 18 months probation and received a $1000 fine.

4. You are advised that you have the opportunity to explain the circumstances which led to this action, and to set forth your views in this matter; your reply may be oral and/or in writing and should be submitted to the undersigned. In this reply, you may set forth any matters, explanations, or denials that you may deem appropriate. You may be accompanied by a representative during any oral explanation, if you so request. However, you must bear any expense involved in making a reply.

5. You are further advised that your reply must be filed within five (5) work days of receipt of this advance notice of proposed separation. However, upon good cause this period will be extended up to an additional five (5) work days for a total of ten (10) work days from the date you receive this notice, provided your request for extension is received within five (5) work days of your acknowledgement of this advance notice of proposed separation for cause. Your reply, either verbally or in writing, or both, will be given full consideration before a final decision is made.

6. A written final decision will be made within ten (10) work days of receipt of your verbal or written reply. However, if you do not reply to this notice, within the authorized five (5) work day reply period, a written decision will be made following the expiration of the authorized reply period.

7. During the advance notice of separation period you will be placed on administrative leave in accordance with the provisions of paragraph 24b, ESB 247.

8. It is requested that you acknowledge receipt of this notice by signing, dating, and returning the attached copy to this office.

Signed

JAMES J. STAPLETON
General Manager

CF: SEER-PE
AAFES-PE-M

Receipt Acknowledged: /s/ A. E. Sheehan

Date: 16 March 76

# DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

| REFERENCE OR OFFICE SYMBOL | SUBJECT |
|---|---|
| ATZJ-PAPX | Incident Involving Shopping Center Manager |

| TO | FROM | DATE | CMT 1 |
|---|---|---|---|
| THRU: DPCA<br>TO: C of S | Post Exchange | 5 February 1976<br>Link/vad/767-2346 | |

1. Reference our DF dated 18 November 1975, subject as above, copy inclosed.

2. Mr. Arthur Sheehan was returned to duty effective 1230 hours today, 5 Feb 76, in accordance with paragraph 5-29 b (8), AR 60-21/AFR 147-15, pending completion of an investigation of criminal charges against him.

3. Mr. Sheehan is performing duties as assigned by the undersigned. He will not return to his former position of Shopping Center Manager, Fort Jackson Exchange. His replacement has been identified and will report for duty in two weeks.

4. An investigation of the Arthur Sheehan case is presently being conducted by the Commander, AAFES under the provisions of paragraph 5-9 d and e, AR 60-21/AFR 147-15. I will apprize you of further development in this case as it occurs.

Paul E Stapleton

JAMES J. STAPLETON
General Manager

3 Incl
1. Tab A
2. Tab B
3. Tab C

CF: PMO (LTC O'Shaughnessy)

Info

DA FORM 2496-1 REPLACES DD FORM 95 (SEP 67), WHICH IS OBSOLETE.

EXHIBIT "B"

DISPOSITION FORM

For use of this form, see AR 340-15; proponent agency is The Adjutant General's O

| ATTENTION OR OFFICE SYMBOL | SUBJECT |
|---|---|
| ATZJ-PAPX | Mr. Arthur E. Sheehan, Former PX Shopping Center Manager |

TO THRU: DPCA

FROM: Post Exchange

DATE: 13 Apr 76

CMT: Mr. Stapleton/lb/782-5103

TO: C of S

1. Reference is made to DF, same subject, 16 Mar 76, copy inclosed.

2. We were advised this date by Hq, AAFES to proceed with the separation for cause of Mr. Arthur Sheehan, former PX Shopping Center Manager, which will be effective with the close of business 19 April 1976.

JAMES S. STAPLETON
General Manager

1 Incl
as

CF: PMO (LTC O'Shaughnessy)
3d CID

TO

Info:
CG
DCG
Co
I
S3
A
CSM

FOR OFFICIAL USE ONLY

DA FORM 2496 1 FEB 63 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE USED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED. * U.S. GPO: 1974-540-543/61

EXHIBIT "C"

EXHIBIT "D"

SE-PIAX 14 April 1976

SUBJECT: Final Decision to Separate

Mr. Arthur E. Sheehan
3500 Fernandina Road, Apt. K-3
Columbia, SC 29210

1. References.

a. Exchange Service Bulletin (ESB) No. 247, Personnel Relations, dated 2 July 1975.

b. Chapter 1, Paragraph 1-3f(6), AR 600-50, Standards of Conduct.

c. Paragraph 1-14, Standards of Conduct, AR 60-21/AFR 147-15, Exchange Service Personnel Policies, dated 12 November 1974.

d. Report of Investigation No. 75-CID063-22675 from the Criminal Investigation Department, dated 30 January 1976.

e. Southeast Exchange Region, PIAX letter, dated 16 March 1976, subject: Advance Notice of Separation for Cause.

f. Your letter dated 26 March 1976, to General Manager, Piedmont Area Exchange, subject: Advance Notice of Separation for Cause.

g. Your letter dated 7 April 1976 to General Manager, Piedmont Area Exchange, subject: Advance Notice of Separation for Cause.

2. This is to advise that full consideration has been given to your written replies of 26 March 1976 and 7 April 1976 concerning your advance notice of separation for cause. However, in view of the entire weight of evidence which resulted in your plea of guilty to charges of one count of simple possession of marijuana and three counts of simple possession of illegal drugs, it is my final decision to separate you for cause under the provisions

of Paragraph 13, ESB No. 247, Personnel Relations, dated 2 July 1975. The basis for your separation is conduct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. Contrary to your reply, the fact that you were arrested on drug charges was widely known in the Piedmont Area Exchange. Your absence from your job was noticed, and the reason for the absence soon became common knowledge. Additionally, local Military Police and Criminal Investigation Division (CID) authorities immediately apprized the Fort Jackson command group of your involvement in the drug affair with a Fort Jackson soldier. I was requested by the Fort Jackson command group to brief them on the incident and to keep them abreast of follow-on developments, and action was initiated by the Commander, Fort Jackson, to bar you from the post, which action is still pending. As to your physical and metal health problems, there is no record at this Exchange that you ever brought the condition to management's attention prior to your arrest. If you had done so, I would have certainly authorized appropriate leave time for medical treatment.

3. Please be advised that this action is taken based upon the same information provided to you pursuant to your Freedom of Information Act request. No outside information contained in the CID report is relied upon as a predicate for this action.

4. The effective date of your separation will be the close of business, 19 April 1976.

5. You are advised that within twenty-one (21) calendar days of receipt of this final decision, you may initiate an appeal of this adverse action under the provisions of Paragraph 81-98, ESB No. 247. Your appeal must contain a statement that you either desire or do not desire an evidentiary hearing. Assistance as to the format and

procedures involved in filing your appeal will be available from the Personnel Manager, Piedmont Area Exchange. Additionally, you have the right to be represented by counsel or any other individual which you may secure at your own expense to present your appeal.

6. Since Federal Unemployment Compensation may be available, you are advised that you may apply at 200 Assembly Street, Columbia, South Carolina.

7. It is requested that you acknowledge receipt of this final decision by signing and dating the attached copy of this letter.

Signed

JAMES J. STAPLETON
General Manager

Receipt Acknowledged: /s/ A. E. Sheehan

Date: 16 April 76

EXHIBIT "E"

ARMY AND AIR FORCE EXCHANGE SERVICE
STAFF SUMMARY MEMORANDUM

| No. | Office | Action |
|---|---|---|
| 1 | General Counsel | Review and Coordination |
| 2 | Assistant to Commander | Information |
| 3 | Chief of Staff | Concurrence |
| 4 | Deputy Commander | Information |
| 5 | Commander | Signature |

| Signature (Full Name) | Date |
|---|---|
| Illegible | 13/12/76 |
| Illegible | 16/12/76 |
| Illegible | 17 Dec. 76 |

| Full Name of Writer: | Telephone Number: | Date: |
|---|---|---|
| R. J. Birkmeyer | 3700 | 18 November 1976 |

Subject:
Appeal of Adverse Action—Mr. Arthur E. Sheehan

Summary:

1. References:

a. Army Regulation (AR) 60-21/Air Force Regulation (AFR) 147-15.

b. Exchange Service Bulletin (ESB) Number 247, dated 2 July 1975.

c. Exchange Service Manual (ESM) 15-5, dated 15 October 1975.

2. *Introduction.* Attached is the complete record of an appeal filed by Mr. Arthur E. Sheehan as a result of his separation for cause. The separation for cause is an adverse personnel action subject to an appeal to the Commander, Army and Air Force Exchange Service (AAFES), under the provisions of references 1a and 1b.

3. All relevant documents received by the hearing examiner are attached in chronological order. Only certain of those to which direct reference is made have been marked by tabs. A chronology of the events of the appeal is as follows:

a. At approximately 0030 hours on 18 November 1975, Mr. Sheehan was arrested at his place of residence by Lexington County (South Carolina) Sheriff's Department in conjunction with officers of CID attached to Fort Jackson.

b. Based upon information provided by CID, later on the same day the General Manager (GM), Piedmont Area Exchange (PIAX) forwarded a Serious Incident Report to the Chief, Southeast Exchange Region (SEER). In that report, he provided a copy of the Disposition Form (DA 2496) by which he had advised the Fort Jackson Command that Mr. Sheehan had been apprehended during the early morning hours of 18 November 1975 for possession of drugs. The report contained various pieces of information, some correct and some incorrect, including allegations that (1) both an Army enlisted man, Specialist 5 Cree and a Mr. Rome, civilian (both of whom allegedly had drug abuse histories) were residing in Mr. Sheehan's apartment, (2) three types of drugs (LSD, MDA and amphetamines) worth approximately $2,139 at "street value" were found in Mr. Sheehan's bedroom, and (3) a notebook allegedly belonging to Mr. Sheehan was also found in which drug transactions were noted along with "several devices normally associated with drugs". At the time, Mr. Sheehan was being held in the Lexington County Jail, Lexington, South Carolina, pending a preliminary hearing. He was placed on Administrative Leave on the same date.

c. On 19 November 1975 a follow up report was provided the Chief, SEER by the GM, PIAX. That report indicated that Mr. Sheehan had been charged with (1) simple possession of marijuana, (2) possession with intent to distribute MDA, (3) possession with intent to

distribute LSD and (4) possession with intent to distribute amphetamines. The report, presumably prepared and forwarded less than 48 hours following Mr. Sheehan's arrest, indicated that it appeared "highly unlikely that Mr. Sheehan will never return to his current assignment", "a possibility that Mr. Sheehan will be barred from the post what with his involvement with a Fort Jackson soldier", and recommended that action be taken to request a replacement for Mr. Sheehan. On 24 November 1975 Mr. Sheehan posted bond and was released from jail.

d. On 1 December 1975 the GM, PIAX forwarded to the Chief, SEER for his information and necessary action the Military Police Blotter, Sheriff's Report and a TWX message pertaining to Mr. Sheehan, Tab A. The TWX message was originated by the Provost Marshall, Fort Jackson. The Commander, Fort Jackson and Headquarters, Department of the Army were action addressees. Commander, TRADOC, Fort Monroe and Commander, AAFES were information addressees.

e. On 15 January 1976, Mr. Sheehan's attorney in a letter to the GM, PIAX stated that the allegations against Mr. Sheehan were misdemeanors rather than felonies, that Mr. Sheehan was currently involved in a cooperative effort with the Lexington County Sheriff's Department and that the attorney had strong indications that charges against Mr. Sheehan would be dismissed.

f. Information provided by the South Carolina, 11th Judicial Circuit Solicitor (prosecuting attorney) on 31 January 1976 indicated that Mr. Sheehan was in felony violation of the South Carolina Code of Justice and if convicted would be subject to a maximum sentence of 15 years imprisonment and a maximum fine of $25,000. On 2 February 1976 correspondence relating to the incident and a personnel request (AAFES Form 1200-29) were submitted to this headquarters by the GM, PIAX requesting prior approval to effect separation action, Tab B. Because Mr. Sheehan is an EMP employee, sepa-

ration may not be effected without the prior approval of the Commander, AAFES. Upon the recommendation of the Director, Personnel Division, an investigating official was appointed pursuant to the provisions of paragraph 5-9, AR 60-21/AFR 147-15.

g. On 6 February 1976, Mr. Sheehan provided the GM, PIAX with letters from an Assistant Solicitor, Lexington County, indicating that the earlier information received from the Solicitor concerning the felony charges was in error. One letter recited the same information provided by Mr. Sheehan's attorney on 15 January 1976, referenced above. The GM, PIAX confirmed that the charges against Mr. Sheehan had, in fact, been reduced to misdemeanors and conveyed the information to the Chief, SEER, by letter dated 10 February 1976, Tab C.

h. The report of investigation and recommendation for separation was dated 3 March 1976 and was based upon information dated 13, 18 and 24 February 1976. Although Mr. Sheehan entered his plea of guilty to misdemeanor charges on 1 March 1976 there is no indication that the Investigating Official was aware of such plea; however, the report did take into account the reduction of charges to misdemeanor level. Prior approval was granted.

i. On 16 March 1976 the GM, PIAX advised the Command at Fort Jackson that Mr. Sheehan had been found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. Mr. Sheehan received an 18 month probationary sentence and a $1,000 fine, Tab D. The GM, PIAX also advised that proceedings to separate Mr. Sheehan for cause had been initiated. On 16 March 1976 the Advance Notice of Separation for Cause was issued, Tab E. The charging paragraph is quoted in its entirety; "The reason for your separation is conduct off the job which reflects discredit on the AAFES and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES. The specific basis

for this action is that on or about 17 November 1975, at Irmo, South Carolina, you had in your possession approximately: 334 Amphetamine tablets (a Schedule I substance) 11.5 grams of MDA (3, 4 Methylenedioxy Amphetamine—also a Schedule I substance), a quantity of PCP (Phencyclidine Hydrocloride), a Schedule III substance, and 40 marijuana plants. The possession of these drugs and plants is in violation of Title 21, U.S. Code annotated, Section 844. Further, on 1 March 1976, in the Lexington County General Sessions Court, Lexington, South Carolina, you were found guilty on one count of simple possession of marijuana and three counts of simple possession of illegal drugs. You were sentenced to 18 months probation and received a $1000 fine." Mr. Sheehan replied to the Advance Notice of Separation verbally on 17 March 1976 and in writing on 19 March 1976, Tab F. In his written reply he requested that he be granted an extension of the reply period and he requested a copy of the CID report referenced in the advance notice of separation. The extension was granted. "A complete copy of the file pertaining to the separation action" *sans* a copy of the CID report was sent to Mr. Sheehan on 26 March 1976 by the General Counsel, this headquarters, Tab G. Mr. Sheehan was directed to the Commander, USACIDC with his request for the CID report.

j. On 26 March 1976 Mr. Sheehan further replied in writing to the Advance Notice of Separation for Cause, Tab H. A 7 April 1976 supplemental reply from Mr. Sheehan to the Advance Notice of Separation was forwarded to the GM, PIAX, and, in turn the GM, PIAX forwarded it to HQ AAFES, Attention: PE-M, Tab I.

k. On 14 April 1976 the Final Decision to Separate was issued to Mr. Sheehan, Tab J. That document recited that the final decision to separate was made ". . . in view of the entire weight of evidence which resulted in your plea of guilty to charges of one count of simple possession of marijuana and three counts of simple possession of illegal drugs . . ." and was based upon ". . . con-

duct off the job which reflects discredit on the Army and Air Force Exchange Service (AAFES) and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES." Mr. Sheehan replied to the Final Decision to Separate on 23 April 1976 requesting an evidentiary hearing, Tab K. He also requested that Mr. Dennis R. Jones, Chief, Systems Development Branch, Data Systems Division, HQ AAFES be made available to act as his representative. On 11 May 1976 the Director, Data Systems Division advised that Mr. Jones consented to the appointment and was, therefore, made available per the request of Mr. Sheehan, Tab L.

1. On 20 May 1976 the hearing examiner advised Mr. Sheehan that an evidentiary hearing would be scheduled at a later date and asked Mr. Sheehan to specify his desires regarding the place of the hearing, Tab M. On 9 June 1976 Mr. Sheehan requested that the hearing be held in Dallas, Texas at HQ AAFES. On 15 June 1976 the hearing examiner advised Mr. Sheehan that the hearing would necessarily be held at the Piedmont Area Exchange, Fort Jackson, South Carolina based upon advice from the management representative that numerous management witnesses would be called. The hearing was scheduled for 1 September 1976, Tab N.

m. On 7 July 1976 Mr. Sheehan wrote to the hearing examiner objecting to the Commander, AAFES being designated as the appellate authority, Tab O.

n. On 20 July 1976 the hearing examiner received a letter from Mr. Sheehan requesting the evidentiary hearing be cancelled due to a death in his immediate family and requesting that he be permitted to submit a written appeal, Tab P. The request was granted. Mr. Sheehan and the management representative were requested to submit all evidence in the way of statements, affidavits, reports and/or written arguments which they wished to have considered.

o. Both the appellant and the management representative were permitted to examine a copy of the evi-

dence submitted by the opposing party with a further opportunity for any rebuttal, Tab Q. The rebuttal was received from the management representative on 20 September 1976 and from Mr. Sheehan on 4 October 1976, Tab R.

4. Paragraph 97b, reference 1b, provides that the appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination. Accordingly, this report and the attachments are forwarded through that office for review.

5. *Issues.* The factual issues before the hearing examiner were determined to be as follows:

a. Did Mr. Sheehan's conduct off the job on or about 17 November 1975 reflect discredit on AAFES and, if so,

b. Is his retention in any capacity incompatible with the best interests of AAFES, and

c. Were the actions taken by the Army and Air Force Exchange Service in accordance with pertinent laws and regulations?

6. *Analysis.* Immediately prior to the time of his separation for cause the appellant was a UA 13, Shopping Center Manager, Fort Jackson Exchange. Prior to that time he had been an Assistant Chief, Systems Development Branch, HQ AAFES, Dallas, Texas; a Systems Program Specialist, Systems Definition and Procurement Branch, HQ AAFES, Dallas, Texas; a Retail Operations Manager, East Georgia Area Exchange, Fort Gordon, Georgia; and Acting General Manager, Mississippi Area Exchange, Keesler Air Force Base, Mississippi.

7. The basis for the allegations set forth in the Advance Notice of Separation alleges that his possession of the items enumerated constituted a violation of federal law; resulted in his conviction within the jurisdiction of South Carolina; brought discredit upon the Army and Air Force Exchange Service and was of such a nature that his retention in any capacity was incompatible with the

best interests of AAFES. The Final Decision dropped all reference to violation of federal law possibly because the Advance Notice improperly referred to amphetamine as a Class I substance vice a Class III substance (Title 21 USCA Section 812), but more likely simply because it was easier to establish that Mr. Sheehan had entered a plea of guilty in the state court. Failure to reiterate that portion of the initial allegations might well be construed as a determination of that allegation in favor of Mr. Sheehan; however, the hearing examiner considers the original recitation merely surplusage to the allegation of the "conduct".

8. In that regard, it is likewise surplusage whether Mr. Sheehan was convicted or not. The basic allegation made against Mr. Sheehan is that his conduct brought discredit upon the Army and Air Force Exchange Service. The allegation that such conduct constitutes either a violation of federal law and/or a violation of state law is pertinent in terms of the severity with which it is judged by those jurisdictions. The separation action must stand or fall based not only upon the nature of the conduct but also upon whether that conduct brought discredit upon the AAFES. If it did then the hearing examiner must further determine whether the record establishes that the conduct and discredit make Mr. Sheehan's retention in any capacity incompatible with the best interests of AAFES. Felonious conduct, as evidenced by the penalties which may be imposed, and certain crimes involving moral turpitude are such that discredit to the AAFES might be inferred when such conduct is established by credible evidence. The same inference may not be drawn for conduct which is proscribed as a misdemeanor. The violation of which Mr. Sheehan stands convicted in the state jurisdiction (and had he been charged with the same charge of simple possession under the federal law) is classified as a misdemeanor. (Title 18 USCA Section 1.) In spite of the references to "plea

bargaining", which implies greater culpability when none necessarily exists, there is no evidence in this record to reveal that Mr. Sheehan's conduct was other than that established by his pleas of guilty—one case of simple possession of less than one ounce of marijuana and three cases of possession of unlawful drugs. Since the conduct is not, *per se*, such that discredit may be inferred, the actual situation must be considered.

9. The record adequately establishes that personnel at Command level and within the exchange were aware of Mr. Sheehan's arrest within a matter of hours. The record also establishes that the information was at least partially incorrect. The hearing examiner does not question for one moment that the general manager's motives were as recited in his statement of 17 August 1976. He states that . . . "in order to quell rumors, mostly erroneous, that were rampant within a day or two following Mr. Sheehan's arrest among approximately 400 exchange employees at Fort Jackson, the undersigned announced at a staff meeting the true facts concerning the Sheehan matter as they were known to me at the time . . ." It must also be acknowledged, however, that the facts as they were known to him at the time (as evidenced by documents being forwarded to the Southeast Exchange Region at the time) were not accurate and, while they may have mitigated the erroneous information being passed by rumor, the information being given to exchange employees made the incident appear more serious than is now established by the allegations of misdemeanor gravity.

10. The Fort Jackson Command had a legitimate interest in the case because it involved a military man. Neither the briefings by exchange management to Command personnel, (which likewise contained inaccurate information) nor the inaccurate gossip and rumor among exchange employees is deemed to establish discredit to AAFES.

11. The remaining question dealing with whether Mr. Sheehan's retention is incompatible with the best interests of AAFES should still be answered. It is apparent that Mr. Sheehan's effectiveness at the Piedmont Area Exchange would be seriously impaired, if not impossible. There is no reason to believe, however, that the cloud engendered by gossip will necessarily follow him anywhere he might be transferred within the worldwide AAFES nor that it would continue to influence his effectiveness at any new assignment. Mr. Sheehan's record with AAFES has been excellent. His abilities may well be utilized at some other location. His long involvement is not unlike alcoholism and is deserving of consideration equal to that indicated in ESB Number 115.

12. *Findings.* The hearing examiner finds from the evidence that:

a. Mr. Arthur E. Sheehan's conduct off the job on or about 17 November 1975 did not reflect discredit on AAFES.

b. His retention in some capacity is not presently incompatible with the best interests of AAFES.

c. The actions taken by the Army and Air Force Exchange Service were in accordance with pertinent laws and regulations.

13. *Recommendation.* Mr. Sheehan has challenged the propriety of the Commander, AAFES acting as appellate authority in this case because of his prior involvement by way of granting prior approval for the separation. Paragraph 7, reference 1b provides that "Except as provided below, the management official is the official with authority to separate at the AAFES organizational element . . . . to which the employee is assigned.", but that "if the employee is an EMP employee whose EMP status is withdrawn by the Commander, AAFES, or who is suspended or separated by the Commander, AAFES, the management official is the Commander, AAFES." Paragraph 97, same reference, provides that the appellate

authority for all appeals is the Commander, AAFES, unless the Commander, AAFES is the management official.

14. Mr. Sheehan argues, in effect, that the granting of prior approval by the Commander, AAFES constitutes an action tantamount to separation; therefore, the Commander, AAFES is, in effect, the management official and the appellate authority should be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services. The hearing examiner believes that that contention has merit. Failure to accord an appellate review at a level above the Commander, AAFES, on EMP separations will subject this Command to criticism and possible legal action on a charge of lack of administrative due process.

15. Based upon the foregoing analysis and findings, it is recommended that the appeal be granted and that Mr. Sheehan be reinstated to his former grade but that he be transferred to an assignment outside the Southeast Exchange Region. The attached Appellate Authority Action has been prepared to accomplish reinstatement upon your approval. Signature is recommended.

16. If, however, the Commander, AAFES determines the foregoing action to be inappropriate, it is recommended that serious consideration be given to forwarding the entire appellate file together with the report and recommendation of the hearing examiner, with or without an Appellate Authority Action, to the Chairman, Army and Air Force Exchange and Motion Picture Services for review.

/s/ R. J. Birkmeyer
R.J. BIRKMEYER
Hearing Examiner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3 78 0222F

ARTHUR EDWARD SHEEHAN

*vs.*

ARMY & AIR FORCE EXCHANGE SERVICE,
AN INSTRUMENTALITY OF THE DEPARTMENTS
OF THE ARMY AND THE AIR FORCE

[Filed May 1, 1978]

## ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant herein, through the United States Attorney for the Northern District of Texas, and in response to the allegations made in Plaintiff's Complaint responds, by correspondingly numbered paragraphs, as follows:

## JURISDICTION

1. Paragraph 1 is jurisdictional in nature and does not require a response; however, to the extent that a response might be required, the Defendant denies that this court has jurisdiction of this case.

## PARTIES

2. Admitted.

3. Admitted, except to state that the AAFES is a nonappropriated fund instrumentality of the United States, and a joint major command of the Departments of the Army and of the Air Force, under the specific control of the respective Secretaries of the Army and of the Air Force.

## FACTS

### COUNT ONE

4. Admitted as to the first sentence, except that Plaintiff was first employed as a Systems Analyst. As to the second sentence, Plaintiff was accepted into the Executive Management Program by the Defendant on 16 January 1968.

5. Admitted.

6. Admitted.

7. Admitted as to the first sentence. As to the remainder of paragraph 7, it contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

8. Admitted.

9. Admitted as to sentences one, three, and four. As to sentence two, denied, as the management official in charge of the separation of Plaintiff was the General Manager, Piedmont Area Exchange.

10. Denied as to the Commander conducting an investigation. Admitted as to the Commander causing to be performed an investigation by a disinterested party.

11. Paragraph 11 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

12. Admitted.

13. Admitted as to sentences one and two. As to sentence number three, the defendant denies that the Hearing Examiner, Mr. Birkmeyer, rendered a decision. Rather, the Hearing Examiner is authorized by regulation to render findings and make recommendations only to the Appellate Authority.

14. Admitted as to finding one of paragraph 14. Denied as to finding two of paragraph 14 where it states, ". . . incompatible with the present interest of AAFES." Admitted, when stated as ". . . presently incompatible with the best interest of AAFES."

15. As to recommendation 1 of paragraph 15, denied. As to recommendation 2 of paragraph 15, admitted. As to recommendation 3 of paragraph 15, denied.

16. Paragraph 16 contains conclusions of law and not averments of facts to which an answer is required, but insofar as an answer may be deemed required, denied.

17. Denied.

18. Paragraph 18 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

19. Paragraph 19 is argumentative in nature and does not contain averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

20. Paragraph 20 is neither admitted nor denied for the reason that this is a prayer for relief that requires neither admission nor denial.

21. As to the first sentence, the Defendant denies that the actions of which the Plaintiff here complains, were willful and/or malicious. As to sentence two, this is a general prayer for relief that requires neither admission nor denial.

## COUNT TWO

22. Paragraph number 22 incorporates paragraphs one through twenty-one of Count One and, as such, does not require a specific answer as these paragraphs have been previously answered herein.

23. Admitted.

24. Paragraph 24 contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, denied.

25. Denied.

26. As to the first sentence of paragraph 26, it is specifically denied that the actions on the part of the defendant were willful and/or malicious. As to the second sentence, this is a prayer for relief for which neither an admission or denial is required.

## PRAYER

Paragraphs 1 through 7 of the prayer contained in the complaint are neither admitted nor denied for the reason that they constitute a prayer for relief that requires neither admission or denial.

## AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Plaintiff lacks standing to maintain this action.

3. The Court lacks jurisdiction over the subject matter of this action because it is, in effect, a suit against the United States to which it has not consented.

4. The Court lacks jurisdiction over the person of the Federal Defendant.

5. Plaintiff has failed to join an indispensable party.

6. Defendant avers that the administrative proceedings held herein complied with the controlling procedures and that the admistrative decision to separate Plaintiff from his AAFES position was neither arbitrary nor capricious and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

7. Any and all actions by the Defendant of which Plaintiff complains were done by them as officials of the United States, Department of the Army, and Department of the Air Force in the course of their official duties and were within the scope of those duties, and, for this reason, are absolutely privileged.

8. The complaint does not present a justiciable case or controversy.

9. Mandamus will not lie against the named Defendants to control their exercise of administrative judgments and discretion.

10. Even if Plaintiff prevails in this case, the Plaintiff is not entitled to the recovery of attorney's fees for the reason that there is no statutory provision entitling him to such; and, further, Plaintiff is not entitled to

punitive damages against the United States as there is no statutory provision entitling him to such.

WHEREFORE, premises considered, the Defendant respectfully prays that, upon final hearing of this case, a judgment be entered denying the Plaintiff all relief sought, directing that he take nothing by this suit, awarding costs and reasonable attorney's fees to the Defendant herein.

Respectfully submitted,

KENNETH J. MIGHELL
United States Attorney

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney
1100 Commerce Street
Room 16-G-28
Dallas, Texas 75242
Phone number: 749-1929

*Of Counsel:*

ARMY AND AIR FORCE EXCHANGE SERVICE
GORDON A. GINSBURG, Colonel, USAF
General Counsel
CARLL J. KRETSINGER, Major, USAF
Assistant General Counsel
3911 Walton Walker Blvd.
Phone number 330-2641
Dallas, Texas 75222

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been mailed, certified, return receipt requested, to Ira E. Tobolowsky at 1900 Southland Center, Dallas, Texas 75201, attorney for Plaintiff, on May 1, 1978.

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA 3 78 0222 F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

*v.*

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, FEDERAL DEFENDANT

[Filed Jul. 21, 1978]

# DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The Federal Defendant by the undersigned attorney moves this court to dismiss the complaint herein, or in the alternative to grant Summary Judgment and as its reasons therefor avers as follows:

1. The Court lacks jurisdiction over the Army and air Force Exchange Service, an instrumentality of the United States, for the reason that suit does not lie against such bodies, *EO NOMINE.*

2. The Plaintiff does not have standing to maintain this cause of action.

3. The complaint fails to state a claim within the jurisdiction of this court.

4. Plaintiff has failed to state a claim upon which relief can be granted and further, Plaintiff has suffered no damages for which he is entitled reimbursement.

Respectfully submitted,

KENNETH J. MIGHELL
United States Attorney

/s/ Stafford Hutchinson
STAFFORD HUTCHINSON
Assistant United States Attorney
1100 Commerce Street
Room 16-G-28
Dallas, Texas 75242
Phone Number 749-1925

*Of Counsel:*

ARMY AND AIR FORCE EXCHANGE SERVICE
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Phone Number 330-2641

[SEAL] [SEAL]

DEPARTMENTS OF
THE ARMY AND THE AIR FORCE

HEADQUARTERS ARMY AND AIR FORCE EXCHANGE SERVICE

Dallas, Texas 75222

ACTION OF APPELLATE AUTHORITY

IN RE THE

APPEAL OF ADVERSE ACTION OF MR. ARTHUR E. SHEEHAN

20 December 1976

Date

The appeal of Mr. Arthur E. Sheehan from the Final Decision of the General Manager, Piedmont Area Exchange, concerning the separation for cause is denied.

This decision is final and not subject to further appeal or review.

/s/ C. W. Hospelhorn
C. W. HOSPELHORN
Major General, USA
Commander

IRA E. TOBOLOWSKY
ATTORNEY AT LAW
1900 Southland Center
Dallas, Texas 75201

(214) 742-9205
January 18, 1978

Major General Bobby Presley
Commander of AAFES
Dallas, Texas 75222

Re: Arthur Edward Sheehan vs. Army and Air Force Exchange Service, an Instrumentality of the Departments of the Army and the Air Force

Dear Major General Presley:

Please be advised that I have been retained by Arthur Edward Sheehan to represent him in the above referenced matter. Mr. Sheehan was in the Executive Management Program and was separated effective 19 April, 1976. Mr. Sheehan contends that his separation was unlawful, in violation of AAFES rules, regulations, and policies, that he was denied due process of law, and that the final decision to separate him was arbitrary, capricious, and an abuse of discretion. Although these are Mr. Sheehan's general complaints, the specific complaints are set forth in particular and in detail in the Complaint, a copy of which I have enclosed.

I have previously discussed this matter with Colonel Ginsburg, General Counsel, and have been supplied, pursuant to the Freedom of Information Act, information concerning this matter. In my recent discussion with Colonel Ginsburg, he requested some time to discuss this matter with you before I filed this suit. I have therefore agreed to withhold the filing of this suit until Wednesday, February 1, 1978. I would appreciate hearing from you

or Colonel Ginsburg before February 1, 1978, if you are interested in attempting to resolve this matter without the necessity of suit.

By copy of this letter I am forwarding a copy of the Complaint to Colonel Ginsburg.

Since the exhibits are bulky, and since Colonel Ginsburg is in possession of these exhibits, I have deleted them from the petition.

Although I have attempted to identify with particularity the exhibits to be attached, if you or Colonel Ginsburg have any trouble determining which exhibits are the correct ones, please contact me.

Yours very truly,

/s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY

IET/ms

encl.

c: Colonel Gordon A. Ginsburg
Mr. Arthur Edward Sheehan

[SEAL] [SEAL]

DEPARTMENTS OF
THE ARMY AND THE AIR FORCE

HEADQUARTERS ARMY AND AIR FORCE EXCHANGE SERVICE

Dallas, Texas 75222

8 Feb. 1978

SUBJECT: Appeal of Adverse Action—
Mr. Arthur E. Sheehan

Lieutenant General Charles E. Buckingham
Chairperson
Board of Directors
Army and Air Force Exchange Service
Room 4E128, The Pentagon
Washington, D.C. 20330

1. At Inclosure 1 is the Hearing Examiner's report in the Appeal of Adverse Action by Mr. Arthur E. Sheehan. Mr. Sheehan, a UA 13 EMP employee, was separated for cause on 19 April 1976. He appealed his separation and the former Commander, AAFES took final action denying the appeal on 20 December 1976.

2. The Hearing Examiner's report in the appeal of adverse action by Mr. Arthur E. Sheehan is submitted for your action as Appellate Authority in accordance with paragraph 97, ESE 247, 2 July 1975. I believe this is required because in this case the former Commander, AAFES, as a result of his prior approval of Mr. Sheehan's separation was, in effect, the Management Official responsible for separating Mr. Sheehan. At Inclosure 2

is a memorandum from my General Counsel supporting this position. At Inclosure 3 is a letter received from the attorney representing the appellant.

/s/ Bobby W. Presley
BOBBY W. PRESLEY
Major General, USAF
Commander

3 Inclosures
As stated

[SEAL]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
Washington, D.C. 20324

27 Feb. 1978

REPLY TO THE ATTN OF: JACM

SUBJECT: Appeal of Adverse Action—Mr. Arthur E. Sheehan

To: AF/AC (Lt General Buckingham)

1. As requested, we have reviewed the file regarding the separation for cause of Mr. Sheehan.

2. The facts of the case are adequately set forth in the Hearing Examiner's report as well as in the General Counsel's review and need not be restated here. The issues presented to you as Chairperson, Board of Directors, AAFES, are two-fold: (1) does the record support the adverse action; and (2) are you the appellate authority in this case?

3. In our opinion, both questions may be answered in the affirmative. There is sufficient evidence in the file to substantiate that Mr. Sheehan's conduct reflected discredit upon AAFES and was such that his continued retention was incompatible with the best interests of AAFES. As to the second question, we agree with Major General Presley and the General Counsel, AAFES, that the former Commander's action in granting prior approval for the separation was sufficient to disqualify him for action as the appellate authority. Accordingly, it is appropriate for you to act in this case.

4. Based upon our review of the file, we recommend that the appeal be denied. In this regard, we note that Mr. Sheehan's attorney has indicated an intention to initiate litigation should the appeal be finally denied (Enclosure 3 to General Presley's letter). For your information, should a complaint be filed in this case, the litigation would be handled by the Department of the Army inasmuch as the case arose at Fort Jackson, South Carolina.

/s/ James Taylor Jr.
JAMES TAYLOR JR.
[Illegible]
[Illegible]
United States Air Force

[SEAL]

BOARD OF DIRECTORS
ARMY AND AIR FORCE EXCHANGE SERVICE
DEPARTMENTS OF THE ARMY AND THE AIR FORCE
Washington, D.C. 20310

ACTION OF APPELLATE AUTHORITY

IN RE THE
APPEAL OF ADVERSE ACTION OF MR. ARTHUR E. SHEEHAN

2 Mar 1978
Date

The appeal of Mr. Arthur E. Sheehan from the Final Decision of the General Manager, Piedmont Area Exchange, concerning the separation for cause is denied.

This decision is final and not subject to further appeal or review.

/s/ Charles E. Buckingham
CHARLES E. BUCKINGHAM
Lt. General, USAF
Chairperson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

*v.*

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT

[Filed Feb. 13, 1979]

## NOTICE OF APPEAL

Notice is hereby given that Arthur Edward Sheehan, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order Granting Defendant's Motion to Dismiss entered in this action on the 15th day of January, 1979.

Respectfully submitted,

LAW OFFICES OF IRA E. TOBOLOWSKY

By /s/ Ira E. Tobolowsky
IRA E. TOBOLOWSKY
2200 Fidelity Union Tower
Dallas, Texas 75201
214/748-9312

# SUPREME COURT OF THE UNITED STATES

No. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

## ORDER ALLOWING CERTIORARI

Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357612 671

NO. 80-1437

Office-Supreme Court, U.S.
FILED
JUL 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

ARTHUR EDWARD SHEEHAN,
Respondent

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

Ira E. Tobolowsky

TOBOLOWSKY & FRIEDMAN
600 Carillon Tower West
13601 Preston Road
Dallas, Texas 75240

ATTORNEYS FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

ARTHUR EDWARD SHEEHAN
Respondent

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## QUESTION PRESENTED

Whether the District Court possesses subject matter jurisdiction under the Tucker Act, 28 U.S.C. §1346 (a) (2) to hear an action brought by a former employee against the Army and Air Force Exchange Service for monetary relief predicated upon an expressed or implied contract of employment.

## CERTIFICATE OF INTERESTED PARTIES

The undersigned, attorneys of record for Respondent Arthur Edward Sheehan, certify that the following listed parties have an interest in the outcome of this case:

Arthur Edward Sheehan
Army and Air Force Exchange Service

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Army Regulation No. 60-21/Air Force Regulation No. 147-15 (November 12, 1974) .....2, 6

## OPINION BELOW

The Opinion of the court of appeals (Petitioner's Appendix A, 1a-16a) is reported at 619 F.2d 1132.

## JURISDICTION

The Judgment of the court of appeals (Petitioner's Appendix C, 18a-19a) was entered on June 27, 1980. A Petition for Rehearing was denied on September 26, 1980 (Petitioner's Appendix D, 20a-21a). On December 18, 1980, Justice Powell extended the time for filing a Petition for Writ of Certiorari to and including February 23, 1981. Thereafter, the Clerk of the Court extended the time for respondent to file this brief in opposition to the Petition for Writ of Certiorari to and including July 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph,

an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (Nov. 12, 1974) provides in pertinent part:

Section II. EXECUTIVE MANAGEMENT PROGRAM

5-6. Purpose. The Executive Management Program (EMP) is intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES.

5-7. Executive Management Program definitions. a. EMP positions are positions so designated by the Commander, AAFES, to include all positions in the entry EMP grade level and above and such other positions as are necessary or suitable for the training and development of individuals for attainment of the EMP grade level.

b. An EMP employee is a United States citizen employee designated an EMP employee by the Commander, AAFES, who has acknowledged in writing that he understands and accepts the conditions of the EMP, as prescribed by the Commander, AAFES.

5-8. Nomination and designation to EMP status. Procedures for nomination, selection, and designation to EMP status will be as published by the Commander, AAFES. Entry grade level for EMP status will be established by the Commander, AAFES, subject to the approval of the Board of Directors. Employees who have previously attained EMP status at lower grade levels

than that currently established as the entry grade level will retain that status, provided they continue to meet the requirements under which they qualified. Such individuals, however, will not be eligible for benefits applicable to EMP grade levels until they attain the entry grade level for EMP as defined above.

5-9. EMP obligations and benefits. a. Obligations of EMP employees are as follows:

(1) EMP employees are obligated to develop and improve their abilities and efficiency to the fullest extent practical in fulfillment of the purpose and principles of the program.

(2) EMP employees are obligated to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer in accordance with paragraph 3-22.

(3) EMP employees who are in the entry EMP grade level or above are obligated to accept the terms of EMP early retirement.

b. Benefits to EMP employees are as follows:

(1) Retention priority in reduction in force (para. 4-12 through 4-16).

(2) Longer notice periods based on length of service in case of certain separations (app.).

(3) Triple indemnity accidental death benefit and supplementary life insurance benefits in accordance with the

AAFES Group Insurance Plan.

(4) For EMP employees in the entry EMP grade level and above only, supplemental retirement benefits and retention of personal grade, regardless of assignment, except as provided in paragraph 5-10h.

c. EMP status may be withdrawn by the Commander, AAFES as provided in a(2) above, or upon determination of unsatisfactory performance in accordance with paragraph 3-2, for gross inefficiency, insubordination, willful violation of laws, regulation, rules, or procedures or for conduct off the job reflecting discredit on AAFES.

d. The Commander, AAFES, may separate an EMP employee for gross inefficiency or for cause, as, appropriate. Gross inefficiency is defined in paragraph 3-7b and cause in paragraph 3-8. Gross inefficiency may exist even though an exchange has been operated in such a way as to generate acceptable returns. The existence of satisfactory performance ratings is not conclusive upon a charge of gross inefficiency, but may be taken into account in determination of this issue.

e. Requests for separation under d above will be submitted to the Commander, AAFES, by the appropriate AAFES headquarters office or division director containing a complete statement of charges against the employee. The Commander, AAFES, will refer the charges to an officer or civilian official for investigation. The officer or civilian official will thoroughly investigate the charges and recommend to the Commander, AAFES, approval or disapproval of the proposed separation, giving all supporting facts disclosed by the investigation.

5-10. EMP selection and promotion. a. The Commander, AAFES, will periodically review and establish, as considered necessary, the number and grade level of positions to be included in the EMP and make recommendations as appropriate

to the Board of Directors.

b. The EMP employee in the entry EMP grade level and above is granted a "personal grade" which does not fluctuate with nor depend on the position occupied (para 4-9).

c. Employees in the grade which is one grade below the entry EMP grade level and EMP employees in the entry EMP grade level and above, except those with personal grades of USP 15, may be promoted upon recommendation of a Central Promotion Board and approval by the Commander, AAFES. EMP employees with personal grade of USP 15 may be promoted upon recommendation of a Central Promotion Board and the Commander, AAFES, and approval by the Board of Directors.

d. The Commander, AAFES, will appoint Central Promotion Boards as appropriate to meet not less often than once each year. Central Promotion Boards will be composed of individuals senior to the grades under consideration for promotion. The boards will have a minimum of 5 members, and normally the chairman will be a senior field grade or general officer.

e. Central Promotion Boards will function as follows:

(1) Review pertinent records furnished by Personnel Division, Headquarters AAFES, of each employee who meets the criteria established by the Commander, AAFES.

(2) Identify and recommend for EMP status and/or promotion those employees who have demonstrated exceptional ability and have the greatest potential for performing successfully at the EMP grade level.

(3) Identify and recommend courses of action which will enable AAFES to more effectively develop any of the

executives under consideration. Recommend a course of action, as appropriate, concerning executives who have been identified through prescribed performance evaluation as marginal.

f. The Commander, AAFES, may approve or disapprove the recommendations of Central Promotion Boards.

g. No employee or new appointee will be granted an EMP grade without the approval of the Commander, AAFES.

h. Personal grades of EMP employees will be withdrawn upon -

(1) Loss of EMP status in accordance with paragraphs 5-9a (2) and 5-9c.

(2) Downgrade pursuant to e(3) above and paragraph 4-6b to a grade level below the entry EMP grade level.

**STATEMENT**

On or about July 2, 1962, respondent was first employed with the Army and Air Force Exchange Service ("AAFES") as a computer programmer. Thereafter, in and about 1967, respondent entered into a different employment contract with AAFES in a special program known as the Executive Management Program ("EMP").

According to the regulation of AAFES, and in particular AR60-21/AFR 147-15, c.5, Section II paragraphs 6-10 ("EMP Regulations"), Respondent was required to execute an employment contract in writing acknowledging and accepting the conditions of EMP. As an EMP employee, respondent had certain special obligations and special benefits as outlined in the EMP Regulations. In fact, the obligations of the EMP employees were substantially different, and more onerous than the obligations of other AAFES employees. These EMP

benefits and obligations are more particularly itemized in the complaint (¶ 5) and in the EMP Regulations.

On March 16, 1976, respondent, while an EMP employee of AAFES serving as shopping center manager for the Fort Jackson Exchange in South Carolina, received advance written notice of termination based upon conduct off the job that allegedly reflected discredit on AAFES and rendered respondent's retention incompatible with the best interests of AAFES. The written notice was received by Respondent immediately after Respondent pled guilty to four misdemeanor offenses of simple possession of illegal drugs. Respondent was subsequently terminated on April 19, 1976, and immediately pursued his administrative appeal.

During the administrative appeal, the hearing examiner for AAFES heard testimony and found, *inter alia*, from the evidence as follows (Complaint, ¶ 14):

1. Respondent's conduct off the job did not reflect discredit on AAFES; and

2. Respondent's retention in some capacity was not incompatible with the present interest of AAFES.

As a result of these findings, the hearing examiner made recommendations which included the following:

1. Respondent be reinstated with back pay to his former grade and transfered to an assignment outside the southeast exchange region; and

2. That failure of AAFES to accord an appellate review at a level above the Commander, AAFES, for Respondent, because of his EMP employment, subjected AAFES to criticism and possible legal action on a charge of lack of administrative due process; and

3. That if the Commander determines the recommendations inappropriate, that the matter be heard by the appellate authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

Despite the findings and recommendations of the hearing examiner of AAFES, Respondent's discharge was sustained by the Commander, AAFES. Thereafter, Respondent brought this action in the United States District Court for the Northern District of Texas, alleging that he had been denied a free and impartial appeal; had been denied procedural due process; that the decision to terminate Respondent was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion; in excess of statutory authority; and contrary to Respondent's constitutional rights. Respondent sought, *inter alia*, monetary relief, employee benefits, and reinstatement.

The District Court dismissed the suit for lack of subject matter jurisdiction (Petitioner's Appendix B, 17a). Respondent timely appealed, and the Court of Appeals reversed and remanded. The Court of Appeals held that the District Court possessed subject matter jurisdiction to provide monetary relief under the Tucker Act, 28 U.S.C. §1346(a) (2), and to award non-monetary compensation from a confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702.

## REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari because the decision of the Court of Appeals is in accord with the decision of this Court in *United States vs. Hopkins*, 427 U.S. 123 (1976) and is not contrary to the decision of this Court in *United States vs. Testan*, 424 U.S. 392 (1976).

As in the Statement, *supra*, the Court of Appeals bifurcated Respondent's claims for relief into two categories, to-wit:

award of non-monetary compensation, and monetary relief. As to the award of non-monetary compensation, the Court of Appeals held that the District Court possessed subject matter jurisdiction from the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702. As a result of this holding, the court reversed the decision of the District Court and remanded the case for trial on the merits. Petitioner did not seek a review by this Court of that portion of the Court's decision; therefore, jurisdiction over Respondent's claims for non-monetary relief is not at issue before this Court.

As to Respondent's claims for monetary relief, the Court of Appeals held that the District Court possessed subject matter jurisdiction to hear the controversy pursuant to the Tucker Act, 28 U.S.C. §1346(a) (2). It is solely this portion of the decision of the Court of Appeals which Petitioner seeks review.

This Court's decision in ***United States v. Hopkins***, supra, is controlling over the instant case. Hopkins was discharged from his position as a civilian employee of the European Exchange System of AAFES for alleged acts of misconduct incompatible with continued employment. Hopkins brought suit in the United States Court of Claims to recover, ***inter alia***, back pay and appropriate allowances. His action was grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process or prescribed regulations and procedures. The United States moved to have the petition dismissed for lack of jurisdiction. Before the Court of Claims, Hopkins argued that Exchange employees were not federal employees, therefore, his relationship with AAFES was contractual (the same as employees in the private sector). The United States, on the other hand, argued that Exchange personnel served by "appointment" rather than contract, and, therefore, the Tucker Act did not confer jurisdiction over his claim. The Court of Claims reaffirmed its earlier decision of ***Keetz v. United States***, 168 Ct.Cl. 205 (1964), holding that employees

of the Exchange Service are not employees of the United States. With this holding, the Court of Claims analogized the relationship between Hopkins and AAFES to the private sector, holding that the relationship was created by contract, either expressed or implied. In its decision, the Court of Claims recognized that its holding was in conflict with the recent decision of the Court of Appeals in ***Young v. United States***, 498 F. 2d 1211 (5 Cir., 1974). In ***Young***, the Court of Appeals held that the Tucker Act did not confer jurisdiction to hear exchange employee cases.

This Court granted certiorari to resolve the conflict between ***Hopkins*** and ***Young***. In ***Hopkins***, this Court held, contrary to the primary contentions of the government, that the Tucker Act applied to employment contracts. This Court stated at 427 U.S. 126:

> Since the statute (Tucker Act) applies, by its terms, to "any express or implied contract" we hold that it is applicable to employment contracts as well as to those for goods or other services.

The government alternatively contended (as it did before the Court of Claims) that AAFES employees did not have a contractual relationship with AAFES, but served by "appointment." This Court analyzed many of the regulations of AAFES and concluded that such an employee could be employed by virtue of a contract or by appointment. This Court, therefore, reversed and remanded the case for the threshhold determination of whether Hopkins was employed by virtue of a contract or served pursuant to appointment.

This Court stated at 427 U.S. 129:

> The Court of Claims, in reaching its conclusion that Plaintiff held his position by virtue of an expressed or implied contract, assumed that, once it was determined

he was not an appointed federal employee, this result followed as a matter of course. It concluded that, in such event, his employment status was governed by a series of cases from the private sector of the economy, holding that the typical employee-employer relationship was contractual in nature. While we do not question the relevance of these cases by way of analogy should Plaintiff be determined not to have been an appointee, we hold the Court of Claims erred in its threshhold determination that AAFES employees could never serve by appointment. Rather, the question depends upon an analysis of the statutes and regulations previously described *in light of whatever evidence is adduced on remand as to Plaintiff's particular status in this case.*

It is thus apparent that the question of whether Plaintiff was employed by virtue of a contract or by appointment is not susceptable of determination at this time. Rather, *the issue is one which must receive additional consideration from the Court of Claims after development of a fuller record* (emphasis added).

Also important for the instant case, is this Court's affirmation of the Court of Claims holding that Hopkins' complaint was sufficient under the Tucker Act to withstand the government's Motion to Dismiss on the grounds of lack of jurisdiction. This Court stated at 427 U.S. 130:

> Plaintiff's allegation that his discharge constituted a breach of contract of employment was sufficient, under the provisions of Pub. L. 91-350 (Tucker Act), to withstand the Government's Motion to Dismiss the Complaint on the grounds of lack of jurisdiction in the Court of Claims, and judgment of the court so holding is therefore affirmed.

In the instant case, as in *Hopkins*, there has been no evidentiary hearing of any type to shed light on whether Respondent was employed by virtue of a contract or by appointment. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of a contract or by appointment. Until such determination is made, the District Court possesses jurisdiction pursuant to the Tucker Act.

Although *Hopkins* was remanded, the Court of Claims never made the determination as to whether Hopkins was employed by virtue of a contract or by appointment, because the case was settled by the parties prior to the decision on remand. Respondent submits that, even if Hopkins had been found to serve by appointment, such decision would not be controlling in the instant case, as Respondent was employed by contract under the special program known as EMP.

Petitioner's contention that the instant case is controlled by this Court's decision in *United States v. Testan, supra*, is erroneous. *Testan* dealt with the claims of two civil service employees who contended that their positions of employment were erroneously classified, and, as a result, they were entitled to reclassification and back payment of salary which they would have received had they been properly classified. This Court stated at 424 U.S. 398:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).
>
> We therefore must determine whether the two other

> federal statutes (the Classification Act and the Back Pay Act) that are invoked by Respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.

This Court decided that neither the Classification Act nor the Back Pay Act conferred a substantive right for Respondents to sue the United States for monetary damages, and since the Tucker Act was merely jurisdictional, Respondents' claims were denied. The employees argued that the Tucker Act fundamentally waived sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation. In response, this Court stated, at 424 U.S. 400:

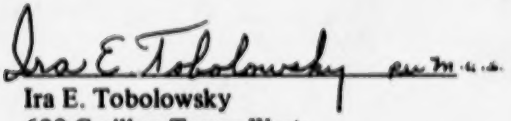
> The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of right of action must be made with specificity. ***The Respondents do not rest their claims upon a contract;*** . . . . (emphasis added).

It is implicit in the Court's decision that, had the employees rested their claim upon a contract, they would have had a substantive right for breach of contract, and, along with that right, a right to sue the United States for monetary damages with jurisdiction being provided by the Tucker Act.

## SUMMARY

In conclusion, based on the foregoing authorities, this Court should deny the Petition for Writ of Certiorari, as the instant case is in accord with *United States v. Hopkins, supra,* and not contrary to *United States v. Testan, supra.* Furthermore, the law is well settled that the Tucker Act contains an immunity waiver which vests the District Court with jurisdiction to render judgment not exceeding $10,000 in amount, upon any claim against the United States founded upon any express or implied contract. See also *Hatzlachh Supply Co., Inc. v. United States,* 444 U.S. 460 (1980).

Respectfully submitted,
TOBOLOWSKY & FRIEDMAN



Ira E. Tobolowsky
600 Carillon Tower West
13601 Preston Rd.
Dallas, Texas 75240
214/233-0444

## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the following counsel of record in this case at the addresses shown by placing same in the United States Mail, postage prepaid, on this the 9th day of July, 1981:

Mr. Wade H. McCree, Jr.
Office of the Solicitor General
Washington, D. C. 20530

Mr. Thomas S. Martin
Mr. Elliott Schulder
Mr. William Kanter
Ms. Eloise E. Davies
Department of Justice
Washington, D. C. 20530

Ira E. Tobolowsky

Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1437

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## REPLY MEMORANDUM FOR THE PETITIONER

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LAWRENCE G. WALLACE
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM 1980

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No. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**REPLY MEMORANDUM FOR THE PETITIONER**

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The narrow question presented by this case and its companion, *Army and Air Force Exchange Service* v. *Gorman*, No. 80-1435 (filed Feb. 23, 1981), is whether an appointed employee of a military exchange who has been discharged may file a civil action for monetary damages against the United States under the Tucker Act (28 U.S.C. 1346(a)(2)) predicated upon an implied-in-fact contract. As we demonstrated in our petition in this case (at 4-14), the court of appeals' holding that Tucker Act jurisdiction may be invoked in such a situation is inconsistent with the Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976).

1. Respondent's contention (Br. in Opp. 9-12) that the decision in *Hopkins* supports the court of appeals' decision in this case is mistaken. In *Hopkins*, this Court held that the Court of Claims had erred in concluding "that AAFES

employees could *never* serve by appointment." 427 U.S. at 130 (emphasis in original). The Court noted (*id.* at 127-128) that Congress recognized that exchange service employees may be appointed to their positions, and that under one set of AAFES regulations (AR 60-21/ AFR 147-15 (Nov. 12, 1974)) "ordinary" employees hold their positions by appointment. In addition, the Court pointed to a different set of AAFES regulations (AR 60-20 / AFR 147-14 (Mar. 21, 1974)) that govern the employment of persons under service contracts to perform "direct service," including "janitorial and window cleaning service," and it noted that exchange service employees are specifically prohibited from receiving service contracts. 427 U.S. at 128-129. The Court in *Hopkins* concluded that resolution of the question whether Hopkins was employed pursuant to a contract "depends upon an analysis of the statutes and regulations" governing the employment of AAFES personnel in light of the evidence to be adduced on remand concerning Hopkins' particular status. *Id.* at 130. Because the regulations cited by this Court in *Hopkins* as applying to appointed employees are the same regulations that govern respondent's employment with the AAFES (see Pet. App. 7a-8a & n.8), it is clear that respondent was employed pursuant to "appointment." Under *Hopkins*, therefore, the district court lacked jurisdiction over respondent's claims for monetary relief.

2. Respondent attempts to avoid the implications of the decisions in *Hopkins* and in *United States* v. *Testan, supra*, by asserting (Br. in Opp. 6, 12, 13) that, unlike the employees in those cases, he was employed by contract as the result of his participation in the AAFES' Executive Management Program ("EMP"). This claim is without merit.

In the first place, the complaint nowhere alleges that respondent was employed pursuant to a contract with the AAFES or that "his discharge constituted a breach of a contract of employment." *United States* v. *Hopkins, supra*,

427 U.S. at 130.[1] To be sure, the complaint states that "[a]s an EMP employee, [respondent] had certain special obligations and special benefits different from other AAFES employees." Complaint, para. 5. But the special obligations and benefits applicable to AAFES employees who are designated to EMP status are set forth in the regulations governing *appointed* AAFES employees (AR 60-21/AFR 147-151, Chapter 5, Section II (Nov. 12, 1974)) and are insufficient to convert the status of a government employee from that of serving pursuant to appointment to that of serving pursuant to a contract. If the law were otherwise, the distinction between appointed and contract employees would disappear, since all government employees, regardless of whether they are appointed or are employed by contract, incur certain obligations and receive certain benefits in connection with their employment.

Indeed, the court of appeals expressly noted (Pet. App. 8a) that respondent's complaint did not refer to an employment contract, and the court assumed that the pertinent AAFES regulations "label the *commencement* of [respondent's] employment as pursuant to 'appointment' " (*ibid.*; emphasis in original). Thus, the theory of the court below was not that the AAFES' regulations governing EMP employees established a contractual relationship, but that the regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to the

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[1] As we noted in the petition (at 9 n.8), subsequent to the decision in *Hopkins*, the Court of Claims has, on two occasions, dismissed suits for back pay brought by discharged exchange service employees under the Tucker Act on the ground that the complaints failed to allege facts establishing a contract relationship and that therefore the court was without subject matter jurisdiction over the action. See *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976); *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977).

regulations in its dealings with him" (*ibid.*). If the court of appeals had accepted respondent's contention that respondent had entered into an employment contract by virtue of his status as an EMP employee, it would have been unnecessary for that court to have resorted to the fiction of an implied-in-fact contract, a fiction that, as we have demonstrated in the petition, is not tenable in light of *Hopkins* and *Testan*.

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General*

JULY 1981

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# In the Supreme Court of the United States

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## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 619 F.2d 1132. The order of the district court (Pet. App. 17a) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on June 27, 1980, and a petition for rehearing was denied on September 26, 1980 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed, after an extension, on February 23, 1981, and was granted on October 5, 1981 (J.A. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth at Pet. App. 22a-35a and Br. in Opp. 2-6.

## STATEMENT

In 1962, respondent was appointed, pursuant to Army and Air Force regulations (AR 60-21/AFR 147-15) (Pet. App. 22a-25a), to a position with the Army and Air Force Exchange Service (AAFES) (J.A. 3, 32). He was later designated by the AAFES commander for participation in the Service's Executive Management Program (EMP) (J.A. 3-4, 32), under which AAFES executive employees

enjoy certain special benefits but may be transferred to any AAFES facility in this country or abroad.[1]

In 1975, while respondent was serving as a shopping center manager at Fort Jackson, South Carolina, local police arrested him at home and seized quantities of amphetamine tablets; phencyclidine hydrochloride, a chemical used in the manufacture of LSD; methylenedioxy amphetamine; and 40 marijuana plants. Pursuant to a plea bargain, he pleaded guilty to four counts of simple possession of the drugs in question and was sentenced to 18 months' probation and a $1,000 fine (J.A. 5, 11-12, 17, 23-24, 32).

After pleading guilty to the criminal charges, respondent received advance written notice of separation for cause based upon conduct off the job that reflected discredit upon the AAFES and rendered his retention incompatible with the best interests of the Service (J.A. 5, 32, 11-13). The letter notifying respondent of his dismissal was signed by James Stapleton, the AAFES general manager for the Piedmont Area, but because of respondent's participation in the Executive Management Program, prior approval had been obtained from the AAFES commander, General C.W. Hospelhorn (J.A. 5, 11, 13,

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[1] The Executive Management Program is intended to meet the AAFES's need for "highly qualified and dedicated executive employees" available for transfer to any AAFES facility. AR 60-21/AF 147-15, ch. 5, § II, ¶ 5-6 (Br. in Opp. 2-6). Nomination and designation to EMP status at appropriate grade levels are controlled by the AAFES commander. EMP employees are obligated to accept transfer throughout the worldwide AAFES but enjoy special retention, insurance, and retirement benefits. EMP status may be withdrawn for gross inefficiency or for cause, including conduct off the job reflecting discredit on the AAFES. See AR 60-21/AFR 147-15, ch. 5, § II, ¶ 5-9.

32). After an investigation of respondent's conduct, Stapleton issued a final notice of separation (J.A. 5-6, 17-19, 32). Respondent appealed, in accordance with AAFES procedures,[2] and the matter was referred to a hearing examiner (J.A. 6, 32). The hearing examiner concluded that the actions taken by the AAFES complied with the pertinent laws and regulations, but he recommended that respondent be reinstated in his former grade and transferred to an assignment outside the Southeast Exchange Region (J.A. 6-7, 20-30, 32-33). However, General Hospelhorn, acting as the appellate authority, disagreed with the hearing examiner and denied respondent's appeal (J.A. 7, 39; Pet. App. 4a).

Respondent then sought reconsideration in a letter addressed to the new AAFES commander, General Bobby W. Presley (J.A. 40-41). Respondent alleged that his separation was contrary to AAFES rules and regulations and that he had been denied due process of law because his appeal had been decided by General Hospelhorn, who had earlier approved his dismissal (*ibid.*). After receiving respondent's letter, General Presley reopened the case and referred it to General Charles E. Buckingham, the chairman of the AAFES board of directors (J.A. 42-43). At General Buckingham's request, the administrative record was reviewed by the Air Force Judge Advocate General, who concluded that there was sufficient evidence showing that respondent's conduct reflected discredit upon the AAFES and that his retention was incompatible with the best interests of the Service (J.A. 44-45). Acting as the

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[2] These procedures are set forth in Exchange Service Bulletin No. 247 (15-52) (July 2, 1975) (Pet. App. 25a-35a).

appellate authority, General Buckingham then denied respondent's appeal (J.A. 46).

In the meantime, respondent had filed suit against the AAFES in the United States District Court for the Northern District of Texas, invoking the court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. 701-706; the Tucker Act, 28 U.S.C. 1346 (a)(2); the mandamus statute, 28 U.S.C. 1361; and the Constitution (J.A. 3). In count one of his complaint, respondent alleged that General Hospelhorn violated AAFES regulations and the Due Process Clause when he decided respondent's initial appeal after having previously approved respondent's dismissal (J.A. 3-8). In count two, respondent alleged that the denial of his appeal was "[a]rbitrary," "capricious," "an abuse of discretion," "unsupported by substantial evidence," "unwarranted by the facts of [the] case," and in violation of unspecified laws and constitutional provisions (J.A. 8-9). Respondent sought injunctive relief and money damages, including back pay (J.A. 9-10). The district court dismissed the action for lack of subject matter jurisdiction (Pet. App. 17a).

The court of appeals reversed (Pet. App. 1a-16a). It held that jurisdiction with respect to respondent's monetary claims was furnished by the Tucker Act, 28 U.S.C. 1346(a)(2), which confers upon the district courts jurisdiction over certain civil claims against the United States, including those not exceeding $10,000 and founded upon express or implied contracts with the AAFES (Pet. App. 5a-9a). In response to the government's argument that respondent had served as an appointed employee rather than pursuant to contract, the court observed (Pet. App. 8a; emphasis in original & footnote omitted):

> Even if the regulations label the *commencement* of Sheehan's employment as pursuant to "appointment," we do not think that ends the inquiry. Other regulations provide that an AAFES employee may be separated for cause only under certain conditions and provide for administrative appeal from the separation decision. These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him.

The court acknowledged that respondent's complaint made no reference to an implied contract, but it held that "[t]he allegation that [respondent's] discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (*id.* at 9a).[3]

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[3] The court of appeals also held that the district court had subject matter jurisdiction over respondent's claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (Pet. App. 10a-15a). The government did not seek review of that holding (Pet. 4 n.4).

## ARGUMENT

### THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN RESPONDENT'S CLAIM FOR MONEY DAMAGES BASED UPON HIS ALLEGEDLY WRONGFUL DISCHARGE FROM AN APPOINTED POSITION WITH THE ARMY AND AIR FORCE EXCHANGE SERVICE

#### A. Introduction and Summary of Argument

This case concerns the jurisdiction of the federal courts to entertain suits for money damages brought against the military exchange services by appointed civilian employees who claim to have been wrongfully discharged. The military exchanges are "instrumentalities of the United States" and share the government's sovereign immunity. *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 606 (1975). Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942) (military exchanges are "arms of the Government" and "integral parts of the War Department"). Consequently, jurisdiction with respect to suits against the exchanges exists only if sovereign immunity has been waived, for as this Court recently reiterated in *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980):

> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).[4]

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[4] The question of sovereign immunity, which is itself jurisdictional, and the separate question of Tucker Act jurisdiction (see *United States* v. *Testan*, 424 U.S. 392, 398 (1976)) happen to be the same in the instant case. As noted above (page 5, *supra*), a waiver of sovereign immunity may be based upon a contract with the United States, and the court of ap-

The power to waive sovereign immunity is vested in Congress (*United States* v. *Testan*, 424 U.S. 392, 399 (1976)), and "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, *supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). It follows that a valid waiver may be found only in a constitutional provision or statute specifically conferring the right to recover money damages from the United States (*United States* v. *Testan*, *supra*, 424 U.S. at 401-402); in a regulation specifically granting such a right (*ibid.*) and promulgated pursuant to a statute expressly authorizing the waiver (see *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938)); or in a contract with the United States entered into by an entity or person possessing "specific authority * * * to make an agreement obligating the United States to pay money * * *." *Kania* v. *United States*, 650 F.2d 264, 268 (Ct. Cl. 1981), cert. denied, No. 81-246 (Oct. 13, 1981). See also, *e.g.*, *Porter* v. *United States*, 496 F.2d 583, 587 (Ct. Cl. 1974); *American-Foreign Steamship Corp.* v. *United States*, 291 F.2d 598, 607 (2d Cir.), cert. denied, 368 U.S. 895 (1961).

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peals relied upon the existence of such a contract. The Tucker Act confers jurisdiction on the district courts (if the amount in controversy does not exceed $10,000) and on the Court of Claims for claims "founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1346(a)(2). Thus, if no such contract exists, as we maintain, jurisdiction is lacking both because sovereign immunity has not been waived and because the terms of the Tucker Act have not been met.

In the present case, the court of appeals failed to identify any constitutional provision, statute, or regulation containing the requisite waiver, and it seems clear that none exists. Respondent claimed (J.A. 7, 8) that his discharge violated the Due Process Clause, but that provision does not waive the government's immunity from damages liability. In *United States* v. *Testan*, *supra*, 424 U.S. at 400, this Court rejected the argument that "the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision." Later that Term, in *United States* v. *Hopkins*, 427 U.S. 123 (1976), a former AAFES civilian employee who alleged that he was wrongfully discharged contended that his due process claims were enforceable under the Tucker Act (*id.* at 130), but this Court noted that *Testan* foreclosed that contention (*ibid.*). Thus, *Testan* and *Hopkins* conclusively establish that the Due Process Clause itself does not waive the government's sovereign immunity from damages liability. See *Carruth* v. *United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980).

Respondent also alleged (J.A. 7, 8-9) that his discharge violated AAFES regulations, but neither the regulations governing employment in the AAFES nor the statutes pursuant to which those regulations were promulgated create a right to monetary relief. The statutes (10 U.S.C. 3012, 8012) authorize the Secretaries of the Army and Air Force to conduct the affairs of their respective departments but do not empower them to waive sovereign immunity. The regulations (AR 60-21/AFR 147-15) (Pet. App. 22a-25a) specify discharge procedures but do not create a right to damages for wrongful discharge. This Court considered those very regulations in *Hopkins* (427 U.S. at 127-128) and implicitly held that they do not waive sovereign immunity. Indeed,

not only do the statutes and regulations governing employment in the AAFES fail to create a right to money damages for wrongful discharge, but in 5 U.S.C. (Supp. III) 2105(c), Congress explicitly denied that right to exchange service personnel by excluding them from the coverage of laws administered by the Office of Personnel Management, including the Back Pay Act, 5 U.S.C. (& Supp. III) 5595 *et seq.*[5] As the Court remarked in *United States* v. *Testan*, *supra*, 424 U.S. at 404, in response to the claim of federal employees that implicit waivers of sovereign immunity could be found in various federal employment statutes:

> [I]f the respondents were correct in their claims * * * many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

Nor can a right to damages in this case be founded upon an express or implied contract. Respondent did not allege the existence of a contractual relationship in his complaint (J.A. 3-10). Nonetheless, the court of appeals based its holding upon "a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to [its regulations concerning discharge procedures] in its dealings with him" (Pet. App. 8a).

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[5] The Back Pay Act is administered by the Office of Personnel Management (see 5 U.S.C. (Supp. III) 5596(c)). The Act permits an employee to recover wages lost due to "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled. 5 U.S.C. (Supp. III) 5596(b). See also 5 C.F.R. 550.801 *et seq.*

The decision below cannot be squared with this Court's decisions in *Hopkins* and *Testan*. In *Hopkins*, an action for money damages filed by a discharged AAFES employee, the Court carefully analyzed the exchange service regulations and drew a sharp distinction between two separate categories of exchange service employees: "ordinary" employees, who are appointed to their positions, and outside contractors who perform jobs such as window cleaning and janitorial services. The Court's implicit holding—that only employees in the latter category could sue for money damages—is irreconcilable with the court of appeals' ruling, which finds that respondent (and presumably all other exchange service appointees) entered at the time of appointment into an implied-in-fact contract under which the exchanges agreed to abide by their regulations. Moreover, respondent, who held an executive position with the AAFES, has not claimed (and the court below did not find) that he was employed under one of the service contracts described in *Hopkins*.

Similarly, in *Testan*, federal employees asserted violations of the Classification Act, 5 U.S.C. 5101 *et seq.*, and invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. 1491. This Court held that their claims against the United States for money damages were barred by sovereign immunity because there was no provision of law expressly creating a right to monetary relief. Under the reasoning of the court below, however, those employees would have been entitled to maintain their suit by virtue of an implied-in-fact contract under which their employer agreed to follow the statutes in question.

Finally, the court of appeals' decision is contrary to basic principles of contract law. That decision

confuses an implied-in-fact contract with a quasi-contract or contract implied in law. An implied-in-fact contract is an actual agreement between the contracting parties, inferred from the parties' words and conduct. By contrast, a quasi-contract or contract implied in law is not an agreement between the parties but an obligation imposed by a court for equitable reasons and without reference to the parties' intent. Since the court below made no reference to the parties' intent in finding that a "contract" existed between respondent and the AAFES, it is clear that the court was relying upon a quasi-contract or contract implied in law. The Tucker Act, however, does not provide jurisdiction for claims predicated upon such obligations, and therefore the district court lacked jurisdiction with respect to respondent's claims for money damages.

**B. Because Respondent's Employment with the AAFES was Pursuant to Appointment Rather Than Contract, His Discharge Could Not Have Constituted a Breach of Contract**

Before 1970, it was settled that the federal courts lacked jurisdiction to entertain civil actions against the United States based upon express or implied contracts with the military exchanges. Then, as now, the Tucker Act conferred jurisdiction with respect to civil actions against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491. However, in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), this Court stated that although the Army Post exchanges were "arms of the Government

deemed by it essential for the performance of governmental functions" and "integral parts of the War Department," the Government had assumed "none of the financial obligations of the exchange." Relying upon that observation, the Court of Claims and some district courts had held that claims against the exchange services were not claims against the United States and that jurisdiction under the Tucker Act was therefore lacking. See, *e.g.*, *Kyer* v. *United States*, 369 F.2d 714 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967); *Bailey* v. *United States*, 201 F. Supp. 604 (D. Alaska 1962); *Pulaski Cab Co.* v. *United States*, 157 F.Supp. 955 (Ct. Cl. 1958); *Borden* v. *United States*, 116 F.Supp. 873 (Ct. Cl. 1953).

In 1970, Congress amended the Tucker Act to remove this perceived inequitable "loophole."* The following identical language was added both to 28 U.S.C. 1491, which confers jurisdiction upon the Court of Claims, and 28 U.S.C. 1346(a)(2), which confers concurrent jurisdiction upon the district courts for claims not exceeding $10,000 (Pub. L. No. 91-350, Section 1, 84 Stat. 449):

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

In *United States* v. *Hopkins*, *supra*, the Court considered the effect of this amendment on monetary claims advanced by discharged military exchange em-

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* See S. Rep. No. 91-268, 91st Cong., 1st Sess. 2 (1969); H.R. Rep. No. 91-933, 91st Cong., 2d Sess. 2 (1970).

ployees. Hopkins, a former employee of the AAFES who claimed to have been wrongfully discharged, invoked the 1970 amendment and sued in the Court of Claims for back pay and allowances. Relying upon a Court of Claims decision holding that an AAFES civilian employee was not a "Federal employee" (*Keetz* v. *United States*, 168 Ct. Cl. 205 (1964)), Hopkins contended that his relationship with the AAFES was therefore "contractual," just like the relationship between employers and employees in the private sector. *Hopkins* v. *United States*, 513 F.2d 1360 (Ct. Cl. 1975). The government maintained, on the other hand, that exchange employees served by appointment rather than by contract and that consequently Hopkins' wrongful discharge claim was not within the purview of the Tucker Act amendment. The Court of Claims accepted Hopkins' argument, reasoning that "since [he was] not a Federal employee his relationship with the AAFES [was] governed by contract principles" (513 F.2d at 1366). This Court granted certiorari to resolve the conflict between the decision of the Court of Claims and the Fifth Circuit's holding in *Young* v. *United States*, 498 F.2d 1211 (1974), that the 1970 amendment was not intended to extend Tucker Act jurisdiction to employee discharge cases but was meant solely for the benefit of commercial contractors who did business with the exchanges. *United States* v. *Hopkins*, *supra*, 427 U.S. at 124.

This Court rejected the reasoning of both lower courts. Disagreeing with the Fifth Circuit, the Court held that the amended statute "is applicable to employment contracts as well as those for goods or other services" (427 U.S. at 126). But the Court also rejected the Court of Claims' "determination that AAFES employees could *never* serve by appointment"

(*id.* at 130; emphasis in original). After carefully analyzing the statutes and regulations governing the AAFES,[7] the Court observed that the Service's "ordinary employees are deemed employees of an instrumentality of the United States, and hold their positions by *appointment*" (*id.* at 127; emphasis in original). The Court added, however, that a separate regulation (AR 60-20/AFR 147-14, ch. 4, §§ II and III (Mar. 21, 1974)) provided for a "process under which a person may be employed by contract" (427 U.S. at 128-129). Such service contracts, the Court noted, could pertain to "services performed off a military installation and 'direct services such as janitorial and window cleaning service' " (*id.* at 129, quoting AR 60-20/AFR 147-14, App. A, ¶ A-6*e*). Noting that a regulation in effect at the time of Hopkins' discharge forbade the exchanges from entering into service contracts with exchange employees, the Court added that the regulatory scheme "clearly distinguished between employment pursuant to appointment and employment pursuant to contract" (*id.* at 129).[8]

While vacating the portion of the Court of Claims' judgment "deciding that [Hopkins] held his employment position by virtue of an express or implied contract, rather than by appointment" (427 U.S. at 130-

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[7] The regulations to which the Court referred are AR 60-21/AFR 147-15, the same regulations that governed respondent's employment with the AAFES (Pet. App. 7a-8a & n.8, 22a-25a).

[8] This regulation is still in effect. The Court also observed that when Congress amended the Tucker Act in 1970 it did not change any of the provisions of the United States Code dealing with exchange employees or require that the exchanges employ all persons pursuant to contract. 427 U.S. at 129.

131), the Court held that Hopkins' "allegation that his discharge constituted a breach of a contract of employment was sufficient * * * to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims" (*id.* at 130). The case was therefore remanded to the Court of Claims with instructions that "the question of whether [Hopkins] was employed by virtue of a contract or by appointment" "depends upon an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case" (*ibid.*).[9]

The decision in *Hopkins* leaves no room for the decision of the court of appeals in the present case. *Hopkins* drew a sharp distinction between two discrete classes of exchange service employees: "ordinary employees," who are appointed to their positions, and employees who work under service contracts. The plain implication of the Court's opinion is that if Hopkins were found on remand to be an "appointed" employee, rather than a contract employee, there would be no contractual relationship on which to base Tucker Act jurisdiction, and Hopkins' action would have to be dismissed. In the present case, respondent has never claimed—and the court below did not hold—that he worked pursuant to one of the service contracts authorized by AAFES regu-

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[9] Hopkins' suit was settled on remand, and therefore no further inquiry was made into his employment status. In subsequent cases, however, the Court of Claims has held that AAFES employees appointed pursuant to the regulations (AR 60-21/AFR 147-15) considered in *Hopkins* cannot bring suit under the Tucker Act for wrongful discharge. See, *e.g.*, *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977); *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976).

lations and discussed in *Hopkins*. Furthermore, it is apparent that respondent's position, which entailed managerial and supervisory responsibilities, was of an entirely different kind from those of service contract employees, who provide janitorial, window-cleaning, and other services commonly furnished by outside contractors.

In addition, the decision below blurs the clear distinction noted in *Hopkins* between "appointed" and "contract" employees. According to the court of appeals, even if respondent were appointed to his position with the AAFES (as he clearly was), he simultaneously entered into an implied contract with the Service "concerning discharge procedures while [he] *continued* in AAFES employment" (Pet. App. 8a; emphasis in original). Such a hybrid cannot exist under the regulatory scheme that this Court analyzed and described in *Hopkins* and that remains in effect today. Nor is it compatible with the long line of authority holding that ordinary government employees do not work under "contract." See, *e.g.*, *Taylor and Marshall* v. *Beckham*, 178 U.S. 548, 577 (1900); *Crenshaw* v. *United States*, 134 U.S. 99, 104-108 (1890); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867); *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416-418 (1851); *Kania* v. *United States*, *supra*, 650 F.2d at 268; *Shaw* v. *United States*, 640 F.2d 1254, 1260 (Ct. Cl. 1981); *Urbina* v. *United States*, 428 F.2d 1280, 1284 (Ct. Cl. 1970).

Indeed, if the decision below were correct, an implied-in-fact contract similar to that found in the present case must have existed in *Hopkins* as well. The implied contract identified by the court of appeals was not found to have arisen because of any

special agreement made between respondent and the AAFES or because of any facts peculiar to respondent's case. Instead, it was found to have been created solely by virtue of the AAFES regulations governing discharge procedures (see Pet. App. 8a-9a). It would seem to follow, therefore, that every other AAFES appointee, including Hopkins, was a party to a similar contract. But if that were true, the terms of this Court's remand in *Hopkins* would be inexplicable. And this inconsistency cannot be explained on the ground that the question of such an implied contract was not before this Court in *Hopkins* but was presented to the court below. Hopkins, unlike respondent, at least alleged in his complaint that he had entered into a contract with the AAFES.

Respondent has sought (Br. in Opp. 6, 12, 13) to distinguish his case from *Hopkins* by pointing out that he participated in the AAFES Executive Management Program. That distinction, however, is of no significance for present purposes, and the court of appeals placed no reliance upon it. The regulations governing the Executive Management Program are part of the regulations governing appointed AAFES employees (AR 60-21/AFR 147-15, ch. 5, § II), and there is nothing in those regulations to suggest that an appointed employee is converted into a contract employee upon entry into the program. To the contrary, employees in the program are "nominated," "selected," and "designated" for participation (AR 60-21/AFR 147-15, ch. 5, § II, ¶¶ 5-7, 5-8) (Br. in Opp. 2)—hardly the terms usually employed when referring to the formation of a contract.

To be sure, a participant in the Executive Management Program must acknowledge "in writing that he understands and accepts the conditions of the EMP,

as prescribed by the Commander, AAFES." AR 60-21/AFR 147-15, ch. 5, § II, ¶ 5-7(b) (Br. in Opp. 2). But analogous written acknowledgments must be executed by many government employees who do not work under contract, including persons who enlist in the military. See *United States* v. *Larionoff*, 431 U.S. 864, 869 (1977). The signing of such an acknowledgment is not proof of a contractual relationship.

Respondent has also suggested (Complaint, ¶ 5; (J.A. 4) that his entry into the Executive Management Program was pursuant to contract because he obtained certain special benefits in exchange for incurring certain special obligations. Again, however, many appointed positions, in all branches of government, involve a similar trade-off. If this factor were sufficient to convert the status of a government employee to one serving pursuant to a contract, the distinction recognized in *Hopkins* between appointed and contract employees would disappear.

**C. Because Respondent's Complaint Was Based Upon Alleged Violations of the Due Process Clause and AAFES Regulations, None of Which Waive Sovereign Immunity, His Claims For Money Damages Are Barred**

The decision of the court of appeals is also incompatible with this Court's decision in *United States* v. *Testan*, *supra*. In *Testan* two civilian trial attorneys with the Department of Defense whose positions were subject to the Classification Act, 5 U.S.C. 5101 *et seq.*, filed suit in the Court of Claims alleging that they had been misclassified at the GS-13 rather than the GS-14 level. They sought reclassification and money damages for the period of their allegedly wrongful classification.

This Court held that the United States had not waived sovereign immunity with respect to the plaintiffs' suit and consequently ordered its dismissal. The Court first rebuffed the suggestion that the Tucker Act provided the requisite waiver, stating that the Act "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages" (424 U.S. at 398). For similar reasons, the Court also found no merit in a variation of the same argument, *i.e.*, that the Tucker Act "waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation" (*id.* at 400). The Court specifically rejected "the argument * * * that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation" (*id.* at 401) and the argument that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages * * *" (*ibid.*). The Court refused "to tamper with [the] established principles" requiring that a constitutional provision, statute, or lawful regulation expressly confer the right to obtain monetary relief (*id.* at 400). Finally, the Court concluded that the requisite waiver could not be found in the Classification Act (*id.* at 398-405). Noting that the Classification Act contains "substantive standards for grading particular positions" and procedural rules "to ensure that those standards are met" (*id.* at 399), the Court held that the Classification Act did not waive sovereign immunity because it did not expressly make the United States liable for pay lost through allegedly improper classifications (*id.* at 399-400).

The court of appeals' analysis cannot be reconciled with these established principles. In both *Testan* and the present case, aggrieved federal employees brought suit against the United States for money damages claiming violations of laws dealing with personnel matters. In both cases, jurisdiction with respect to the monetary claims depended upon the Tucker Act. In neither case was there a constitutional provision, statute, or regulation expressly granting a right to monetary relief. Accordingly, this Court's decision in *Testan* that sovereign immunity had not been waived dictates a similar result here.

Of course, *Testan* differs from the present case in several particulars, but none is controlling for present purposes. First, the employees in *Testan* alleged violations of the Classification Act and regulations promulgated thereunder, whereas respondent claimed violations of AAFES personnel regulations. What is significant, however, is that in neither case did the provisions allegedly violated expressly grant a right to recover money damages. Second, the employees in *Testan* brought suit in the Court of Claims under 28 U.S.C. 1491, whereas respondent filed his action in the district court under 28 U.S.C. 1346(a)(2). In both cases, however, jurisdiction of the claims for money damages depended upon provisions conferring jurisdiction with respect to civil actions against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States * * *." It is settled that the jurisdictional grants contained in those provisions are identical, except for the $10,000 limit contained in 28 U.S.C. 1346(a)(2). *Richardson* v. *Morris*, 409 U.S. 464, 466 (1973); *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941).

Finally, the employees in *Testan* did not "rest their claims upon a contract" (424 U.S. at 400), whereas the court of appeals construed respondent's complaint as alleging the breach of an implied-in-fact contract (Pet. App. 9a). However, this apparent distinction between the two cases is illusory. As previously noted, respondent's complaint did not allege a breach of contract, but the court of appeals held that "[t]he allegation that the discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (*ibid.*). By that reasoning, the complaint in *Testan*, which alleged violations of the governing statutes and regulations, must have alleged a similar breach of contract. Instead, the court of appeals' analysis would convert virtually every federal employee claim based on a violation of employment statutes or regulations into a contract claim. This result would evade the long-settled restriction on waivers of sovereign immunity reiterated in *Testan* and would render statutes such as the Back Pay Act superfluous. See 424 U.S. at 404.

**D. The Obligations Found By the Court of Appeals To Have Been Incurred by the AAFES Arose From a "Quasi-Contract" or "Contract Implied in Law," Rather than a "Contract Implied in Fact"**

Not only is the decision of the court of appeals in conflict with *Hopkins* and *Testan*, but it does violence to rudimentary principles of contract law. The decision below confuses a "quasi-contract" or a contract "implied in law" with a contract "implied in fact." The Tucker Act does not confer jurisdiction with respect to "quasi-contracts" or contracts "im-

plied in law." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925); *United States* v. *Algona Lumber Co.*, 305 U.S. 415, 418 (1939).

An implied-in-fact contract is an agreement "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & O. R.R.* v. *United States*, 261 U.S. 592, 597 (1923). "An implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt." *Bloomgarden* v. *Coyer*, 479 F.2d 201, 208 (D.C. Cir. 1973) (footnote omitted). See also, *e.g.*, *Somali Development Bank* v. *United States*, 508 F.2d 817, 822 (Ct. Cl. 1974); *Algonac Manufacturing Co.* v. *United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970); *Kirk* v. *United States*, 451 F.2d 690, 695 (10th Cir. 1971); 1 A. Corbin, *Contracts* § 18 (1963 & Supp. 1980); 1 *Williston Contracts* § 3 (Jaeger ed. 1957 & Cum. Supp. 1981); *Restatement of Contracts* § 5, Comment (1932).

By contrast, a contract implied in law or a quasi-contract "is not a contract at all." *Bloomgarden* v. *Coyer*, *supra*, 479 F.2d at 208. "[I]t is an obligation that is created by the law without regard to expressions of assent by either words or acts." 1 A. Corbin, *Contracts* § 19, at 44 (1963). See also, *e.g.*, *Algonac Manufacturing Co.* v. *United States*, *supra*, 428 F.2d at 1255; *Fidelity & Deposit Co.* v. *Harris*, 360 F.2d 402 (9th Cir. 1966); 1 *Williston*

*on Contracts* § 3A (Jaeger ed. 1957 & Cum. Supp. 1981); *Restatement of Contracts* § 5, Comment (1932). "Quasi contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties." 1*Williston on Contracts* § 3A, at 13 (Jaeger ed. 1957).

In the present case, it is clear that what was labeled by the court of appeals as an implied-in-fact contract was, at best, a contract implied in law or quasi-contract. Respondent's complaint did not allege and the court of appeals did not find that there had been an actual agreement or meeting of the minds between the parties. Nor did respondent's complaint make any reference to his actual understanding of the terms of his employment when he was initially appointed to a position with the AAFES or when he was later designated for participation in the Executive Management Program. Instead, respondent merely alleged that his termination violated due process and the AAFES regulations governing discharge procedures, and the court of appeals found that a "contract" existed solely by virtue of those regulations and "the well-established legal principle that a federal agency is bound to follow its regulations where the rights of individuals are affected" (Pet. App. 9a).[10]

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[10] Neither of the two cases cited by the court below (Pet. App. 8a) supports its holding that the AAFES regulations governing discharge procedures gave rise to an implied-in-fact contract with its appointees. In *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518 (5th Cir. 1948), which was decided prior to *Testan*, the regulation in question expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conservation and Domestic Allotment Act. The court did not suggest that a Tucker Act remedy on an implied-in-fact contract theory

Thus, the obligation that the AAFES was found to have incurred by the court of appeals was one "imposed by the law for the purpose of bringing about justice without reference to the intention of the parties" (1 *Williston Contracts* § 3A, at 13 (Jaeger ed. 1957)). Such an obligation is a "quasi-contract" or contract "implied in law." Because the Tucker Act does not confer jurisdiction with respect to claims founded upon a quasi-contract or contract implied in law, respondent's claims for monetary relief should have been dismissed.[11]

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could be based on an agency's failure to abide by regulations that made no reference to money payments. In *Bodek* v. *Department of Treasury*, 532 F.2d 277, 279 n.7 (2d Cir. 1976), the court merely stated that certain "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds." Obviously, holding that regulations are considered an implied part of an express contract is far different from holding that regulations themselves give rise to an implied-in-fact contract.

By the same token, cases such as *Morton* v. *Ruiz*, 415 U.S. 199 (1974), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), on which the court of appeals relied (Pet. App. 9a), merely state a rule of administrative law and do not suggest that the government's failure to abide by its regulations constitutes a breach of contract giving rise to a claim for damages. See *United States* v. *Caceres*, 440 U.S. 741, 754 (1979).

[11] Although sovereign immunity bars respondent's claims for monetary relief, he is hardly left remediless. The court of appeals held that jurisdiction exists with respect to his claims for nonmonetary relief, including reinstatement, accrued vacation time, and sick leave. That holding is not challenged here. See page 6, note 3, *supra*. Moreover, respondent's discharge has already been subjected to detailed administrative review at several levels. However, monetary relief for wrongfully discharged AAFES employees must await congressional action. Should Congress wish to provide for such relief, it could do so simply by including AAFES employees within the coverage of the Back Pay Act.

## CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

versus

ARTHUR EDWARD SHEEHAN
Respondent

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED

Whether the District Court possesses subject matter jurisdiction under the Tucker Act, 28 U.S.C. §1346 (a) (2) to hear an action brought by a former employee in the Executive Management Program against the Army and Air Force Exchange Service for monetary relief predicated upon an expressed or implied-in-fact contract.

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## OPINION BELOW

The Opinion of the court of appeals (Petitioner's Appendix A, la-16a) is reported at 619 F.2d 1132. The Order of the District Court (Petitioner's Appendix B, 17a) is not reported.

## JURISDICTION

The Judgment of the court of appeals (Petitioner's Appendix C, 18a-19a) was entered on June 27, 1980, and a petition for rehearing was denied on September 26, 1980 (Petitioner's Appendix D, 20a-21a). The petition for a writ of certiorari was filed, after an extension, on February 23, 1981. and was granted on October 5, 1981 (J. A. 48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulationof an execution department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy

Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (Nov. 12, 1974) provides in pertinent part:

Section II. EXECUTIVE MANAGEMENT PROGRAM

5-6. Purpose. The Executive Management Program (EMP) is intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES.

5-7. Executive Management Program definitions. a. EMP positions are positions so designated by the Commander, AAFES, to include all positions in the entry EMP grade level and above and such other positions as are necessary or suitable for the training and development of individuals for attainment of the EMP grade level.

b. An EMP employee is a United States citizen employee designated an EMP employee by the Commander, AAFES, who has acknowledged in writing that he understands and accepts the conditions of the EMP, as prescribed by the Commander, AAFES.

5-8. Nomination and designation to EMP status. Procedures for nomination, selection, and designation to EMP status will be as published by the Commander, AAFES. Entry grade level for EMP status will be established by the Commander, AAFES, subject to the approval of the Board of Directors. Employees who have previously attained EMP status at lower grade levels than that currently established as the entry grade level will

retain that status, provided they continue to meet the requirements under which they qualified. Such individuals, however, will not be eligible for benefits applicable to EMP grade levels until they attain the entry grade level for EMP as defined above.

5-9. EMP obligations and benefits. a. Obligations of EMP employees are as follows:

(1) EMP employees are obligated to develop and improve their abilities and efficiency to the fullest extent practical in fulfillment of the purpose and principles of the program.

(2) EMP employees are obligated to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer in accordance with paragraph 3-22.

(3) EMP employees who are in the entry EMP grade level or above are obligated to accept the terms of EMP early retirement.

b. Benefits to EMP employees are as follows:

(1) Retention priority in reduction in force (para. 4-12 through 4-16).

(2) Longer notice periods based on length of service in case of certain separations (app.).

(3) Triple indemnity accidental death benefit and sup-

plementary life insurance benefits in accordance with the AAFES Group Insurance Plan.

(4) For EMP employees in the entry EMP grade level and above only, supplemental retirement benefits and retention of personal grade, regardless of assignment, except as provided in paragraph 5-10h.

c. EMP status may be withdrawn by the Commander, AAFES as provided in a(2) above, or upon determination of unsatisfactory performance in accordance with paragraph 3-2, for gross inefficiency, insubordination, willful violation of laws, regulation, rules, or procedures or for conduct off the job reflecting discredit on AAFES.

d. The Commander, AAFES, may separate an EMP employee for gross inefficiency or for cause, as, appropriate. Gross inefficiency is defined in paragraph 3-7b and cause in paragraph 3-8. Gross inefficiency may exist even though an exchange has been operated in such a way as to generate acceptable returns. The existence of satisfactory performance ratings is not conclusive upon a charge of gross inefficiency, but may be taken into account in determination of this issue.

e. Requests for separation under d above will be submitted to the Commander, AAFES, by the appropriate AAFES headquarters office or division director containing a complete statement of charges against the employee. The Commander, AAFES, will refer the charges to an officer or civilian official for investigation. The officer or civilian official will thoroughly investigate the charges and recommend to the Commander, AAFES, approval or disapproval of the proposed separation, giving all supporting facts disclosed by the investigation.

5-10. EMP selection and promotion. a The Commander, AAFES, will periodically review and establish, as considered necessary, the number and grade level of positions to be includ-

ed in the EMP and make recommendations as appropriate to the Board of Directors.

b. The EMP employee in the entry EMP grade level and above is granted a "personal grade" which does not fluctuate with nor depend on the position occupied (para 4-9).

c. Employees in the grade which is one grade below the entry EMP grade level and EMP employes in the entry EMP grade level and above, except those with personal grades of USP 15, may be promoted upon recommendation of a Central Promotion Board and approval by the Commander, AAFES. EMP employees with personal grade of USP 15 may be promoted upon recommendation of a Central Promotion Board and the Commander, AAFES, and approval by the Board of Directors.

d. The Commander, AAFES, will appoint Central Promotion Boards as appropriate to meet not less often than once each year. Central Promotion Boards will be composed of individuals senior to the grades under consideration for promotion. The boards will have a minimum of 5 members, and normally the chairman will be a senior field grade or general officer.

e. Central Promotion Boards will function as follows:

(1) Review pertinent records furnished by Personnel Division, Headquarters AAFES, of each employee who meets the criteria established by the Commander, AAFES.

(2) Identify and recommend for EMP status and/or promotion those employees who have demonstrated exceptional ability and have the greatest potential for performing successfully at the EMP grade level.

(3) Identify and recommend courses of action which

will enable AAFES to more effectively develop any of the executives under consideration. Recommend a course of action, as appropriate, concerning executives who have been identified through prescribed performance evaluation as marginal.

f. The Commander, AAFES, may approve or disapprove the recommendations of Central Promotion Boards.

g. No employee or new appointee will be granted an EMP grade without the approval of the Commander, AAFES.

h. Personal grades of EMP employees will be withdrawn upon -

(1) Loss of EMP status in accordance with paragraphs 5-9a(2) and 5-9c.

(2) Downgrade pursuant to e(3) above and paragraph 4-6b to a grade level below the entry EMP grade level.

## STATEMENT

On or about July 2, 1962, respondent was first employed with the Army and Air Force Exchange Service ("AAFES") as a computer programmer. Thereafter, in and about 1967, respondent entered into a different employment contract with AAFES in a special program known as the Executive Management Program ("EMP").

According to the regulation of AAFES, and in particular AR60-21/AFR 147-15, c. 5, Section II paragraphs 6-10 ("EMP Regulations"), Respondent was required to execute an employment contract in writing acknowledging and accepting the conditions of EMP. As an EMP employee, respondent had certain special obligations and special benefits as outlined in the EMP Regulations. In fact, the obligations of the EMP employees were substantially different, and more onerous than

the obligations of other AAFES employees. These EMP benefits and obligations are more particularly itemized in the Complaint (¶ 5) (Joint Appendix 4), and in the EMP Regulations.

On March 16, 1976, respondent, while an EMP employee of AAFES serving as shopping center manager for the Fort Jackson Exchange in South Carolina, received advance written notice of termination based upon conduct off the job that allegedly reflected discredit on AAFES and rendered respondent's retention incompatible with the best interests of AAFES. The written notice was received by Respondent immediately after Respondent pled guilty to four misdemeanor offenses of simple possession of illegal drugs. Respondent was subsequently terminated on April 19, 1976, and immediately pursued his administrative appeal.

During the administrative appeal, the hearing examiner for AAFES heard testimony andfound, ***inter alia***, from the evidence as follows (Complaint, ¶ 14) (Joint Appendix 29):

1. Respondent's conduct off the job did not reflect discredit on AAFES; and

2. Respondent's retention in some capacity was not incompatible with the present interest of AAFES.

As a result of these findings, the hearing examiner made recommendations which included the following:

1. Respondent be reinstated with back pay to his former grade and transfered to an assignment outside the southeast exchange region; and

2. That failure of AAFES to accord an appellate review at a level above the Commander, AAFES, for Respondent, because of his EMP employment, subjected AAFES to criticism and possible legal action on a charge of lack of administrative due process: and

3. That if the Commander determines the recommendations inappropriate, that the matter be heard by the appellate authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

Despite the findings and recommendations of the hearing examiner of AAFES. Respondent's discharge was sustained by the Commander, AAFES. Thereafter, Respondent brought the present action in the United States District Court for the Northern District of Texas. Respondent sought, *inter alia*, monetary relief, employee benefits, and reinstatement.

The District Court, without a hearing or arguments of counsel, dismissed the suit for lack of subject matter jurisdiction (Petitioner's Appendix B, 17a). Respondent timely appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals bifurcated Respondent's claims for relief into two categories, to-wit: award for non-monetary compensation, and award for monetary relief. As to the award for non-monetary compensation, the Court of Appeals held that the District Court possessed subject matter jurisdiction from the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702. As a result of this holding, the court reversed the decision of the District Court and remanded the case for trial on the merits. Petitioner did not seek a review by this Court of that portion of the Court's decision; therefore, jurisdiction over Respondent's claim for non-monetary relief is not at issue before this Court.

As to Respondent's claims for award for monetary relief, the Court of Appeals held that the District Court possessed subject matter jurisdiction to hear the controversy pursuant to the Tucker Act, 28 U.S.C. §1346(a)(2). It is solely this portion of the decision of the Court of Appeals which Petitioner seeks review.

## ARGUMENT

THE DISTRICT COURT POSSESSES SUBJECT MATTER JURISDICTION UNDER THE TUCKER ACT, 28 U.S.C. §1346(a) (2) TO ENTERTAIN RESPONDENT'S CLAIM FOR MONETARY DAMAGES BASED ON RESPONDENT'S WRONGFUL DISCHARGE FROM THE EXECUTIVE MANAGEMENT PROGRAM OF THE ARMY AND AIR FORCE EXCHANGE SERVICE FOR ANY ONE OR MORE OF THE FOLLOWING REASONS:

A. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISION OF THIS COURT IN *UNITED STATES V. HOPKINS*, 427 U.S. 123 (1976) AND IS NOT CONTRARY TO THE DECISION OF THIS COURT IN *UNITED STATES V. TESTAN*, 424 U.S. 392 (1976).

B. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES.

C. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF SPECIAL AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES FOR EMPLOYEES IN THE EXECUTIVE MANAGEMENT PROGRAM.

D. THERE IS AN IMPLIED CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED CONTRACT IS PART OF AN EXPRESSED EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

E. THERE IS AN IMPLIED CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED CONTRACT IS PART OF AN EXPRESSED EMP EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

F. IF THERE IS NO IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES, THEN THE DISTRICT COURT POSSESSES JURISDICTION TO AWARD DAMAGES IF THE DISTRICT COURT, AFTEK DEVELOPMENT OF A FULLER RECORD, DETERMINES THAT RESPONDENT SERVE AAFES PURSUANT TO AN EMPLOYMENT CONTRACT(S) (EITHER AS AN ORDINARY AAFES EMPLOYEE OR AS AN EMP EMPLOYEE).

ARGUMENT FOR POINTS A AND F

A. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISION OF THIS COURT IN *UNITED STATES V. HOPKINS*, 427 U.S. 123 (1976) AND IS NOT CONTRARY TO THE DECISION OF THIS COURT IN *UNITED STATES V. TESTAN*, 424 U.S. 392 (1976).

F. IF THERE IS NO IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES, THEN THE DISTRICT COURT POSSESSES JURISDICTION TO AWARD DAMAGES IF THE DISTRICT COURT, AFTER DEVELOPMENT OF A FULLER RECORD, DETERMINES

THAT RESPONDENT SERVED AAFES PURSUANT TO AN EMPLOYMENT CONTRACT(S) (EITHER AS AN ORDINARY AAFES EMPLOYEE OR AS AN EMP EMPLOYEE).

This Court's decision in *United States v. Hopkins*, supra, is controlling over the instant case. Hopkins was discharged from his position as a civilian employee of the European Exchange System of AAFES for alleged acts of misconduct incompatible with continued employment. Hopkins brought suit in the United States Court of Claims to recover, *inter alia*, back pay and appropriate allowances. His action was grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process or prescribed regulations and procedures. The United States moved to have the petition dismissed for lack of jurisdiction. Before the Court of Claims, Hopkins argued that Exchange employees were not federal employees: therefore, his relationship with AAFES was contractual (the same as employees in the private sector). The United States, on the other hand, argued that Exchange personnel served by "appointment" rather than contract, and, therefore, the Tucker Act did not confer jurisdiction over his claim. The Court of Claims reaffirmed its earlier decisions of *Keetz v. United States*, 168 Ct. Cl., 205 (1964), holding that employees of the Exchange Service are not employees of the United States. With this holding, the Court of Claims analogized the relationship between Hopkins and AAFES to the private sector, holding that the relationship was created by contract, either expressed or implied. In its decision, the Court of Claims recognized that its holding was in conflict with the decision of the Court of Appeals in *Young v. United States*, 498 F.2d 1211 (5th. Cir., 1974). In *Young*, the Court of Appeals held that the Tucker Act did not confer jurisdiction to hear exchange employee cases.

This Court granted certiorari to resolve the conflict between

*Hopkins* and *Young*. In *Hopkins*, this Court held, contrary to the primary contentions of the government, that the Tucker Act applied to employment contracts. This Court states at 427 U.S. 126:

> Since the statute (Tucker Act) applies, by its terms, to "any express or implied contract" we hold that it is applicable to employment contracts as well as to those for goods or other services.

The government alternatively contended (as it did before the Court of Claims) that AAFES employees did not have a contractual relationship with AAFES, but served by "appointment." This Court analyzed many of the regulations of AAFES and concluded that such an employee could be employed by virtue of a contract or by appointment. This Court, therefore, reversed and remended the case for the threshhold determination of whether Hopkins was employed by virtue of a contract or served pursuant to appointment.

This Court stated at 427 U.S. 129:

> The Court of Claims, in reaching its conclusion that Plaintiff held his position by virtue of an expressed or implied contract, assumed that, once it was determined he was not an appointed federal employee, this result followed as a matter of course. It concluded that, in such event, his employment status was governed by a series of cases from the private sector of the economy, holding that the typical employee-employer relationship was contractual in nature. While we do not question the relevance of these cases by way of analogy should Plaintiff be determined not to have been an appointee, we hold the Court of Claims erred in its threshhold de-

> termination that AAFES employees could never serve by appointment. Rather, the question depends upon an analysis of the statutes and regulations previously described ***in light of whatever evidence is adduced on remand as to Plaintiff's particular status in this case.***
>
> It is thus apparent that the question of whether Plaintiff was employed by virtue of a contract or by appointment is not susceptable of determination at this time. Rather, ***the issue is one which must receive additional consideration from the Court of Claims after development of a fuller record*** (emphasis added).

Also important for the instant case, it this Court's affirmation of the Court of Claims holding that ***Hopkins*** complaint was sufficient under the Tucker Act to withstand the government's Motion to Dismiss on the grounds of lack of jurisdiction. This Court stated at 427 U.S. 130:

> Plaintiff's allegation that his discharge constituted a breach of contract of employment was sufficient, under the provisions of Pub. L. 91-350 (Tucker Act), to withstand the Government's Motion to Dismiss the Complaint on the grounds of lack of jurisdiction in the Court of Claims, and judgment of the court so holding is therefore affirmed.

In the instant case, as in ***Hopkins***, there has been no evidentiary hearing of any type to shed light on whether Respondent was employed by virtue of a contract or by appointment. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of a contract or by appointment. Until such determination is made, the District Court possesses juris-

diction pursuant to the Tucker Act.

Although *Hopkins* was remanded, the Court of Claims never made the determination as to whether Hopkins was employed by virtue of a contract or by appointment, because the case was settled by the parties prior to the decision on remand. Respondent submits that, even if Hopkins had been found to serve by appointment, such decision would not be controlling in the instant case, as Respondent was employed by contract under the special program known as EMP.

Petitioner's contention that the instant case is controlled by this Court's decision in *United States v. Testan, supra,* is erroneous. *Testan* dealt with the claims of two civil service employees who contended that their positions of employment were erroneously classified, and, as a result, they were entitled to reclassification and back payment of salary which they would have received had they been properly classified. This Court stated:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforeable against the United States for money damages. The Court of Claims has recognized that the act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S S. Corp. v. United States,* 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967). 424 U.S. 398.
>
> The Respondents do not rest their claims upon a contract; . . . At 399. 424 U.S. 399.
>
> The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. 424 U.S. 402.

From this language in ***Testan***, the implication is clear that a claim upon a contract and a claim for wrongful discharge of employment are substantive rights enforceable against the United States for monetary damages under the Tucker Act.

Therefore, based on the foregoing authorities, this Court should affirm the decision of the Court of Appeals and remand the case for development of a fuller record.

## ARGUMENT FOR POINTS B AND C

B. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES.

C. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF SPECIAL AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES FOR EMPLOYEES IN THE EXECUTIVE MANAGEMENT PROGRAM.

An implied-in-fact contract existed between Respondent and Petitioner that AAFES would adhere to its regulations in dealing with Petitioner. As stated in ***Porter v. United States***, 496 F.2d 583, 590, 294 Ct. Cl. 355 (1974) cert. denied, 420 U.S. 1004, 95 S. Ct. 1446, 43 L. Ed. 2d 761 (1975):

> The general rule in government contract law is that a contract implied-in-fact is one founded upon a meeting of minds, which, although not embodied in an expressed contract, is inferred, as a fact, from the conduct of the parties, in light of the surrounding circumstances, their tacit understanding.

The regulations of AAFES and the regulations of AAFES in

regard to EMP employees, as they relate to the termination of employment, create such an implied-in-fact contract. These regulations are particularly set forth in AR60-21/AFR 147-15, including, but not limited to, c. 3, Section II and c. 5, Section II. It is from these regulations that the parties: (i) derive an understanding concerning their rights and expectations in regards to termination of employment; and (ii) find the procedures to be used concerning such termination. In the instant case, there was a meeting of the minds and a tacit understanding of the parties, as contemplated by *Porter*, supra, that the AAFES regulations regarding termination of employment of Respondent would be followed. This meeting of the minds and tacit understanding of the parties was clearly manifiested by the subsequent actions of the parties. This tacit understanding is further reinforced by the well-established principal that federal agencies are bound to follow their regulations where the rights of individuals are affected. *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S. Ct. 1055, 1074, 39 L. Ed.2d 270 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S. Ct. 968, 972-73, 3 L. Ed. 2d 1012 (1959).

In support of its decision in the instant case that the AAFES Regulations were part of a collateral implied-in-fact contract, the Fifth Circuit relied upon *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518, 520-21 (5th Cir. 1948) and *Bodek v. Department of Treasury*, 532 F.2d 277 n. 7 (2d Cir.) (per curiam) cert. denied 429 U.S. 849, 97 S. Ct. 137, 50 L. Ed. 2d 122 (1976).

The facts of *Aycock-Lindsey*, supra, dealt with a claim under the Soil Conservation and Domestic Allotment Act. 16 U.S.C. A., §590a, et seq. Jurisdiction was sought in the United States District Court pursuant to the Tucker Act, Title 28 U.S.C.A., §41(20) [now §1346]. The court of appeals, in reversing the district court's decision, considered the plaintiff's claim based upon regulations of the Federal Government serving as a foun-

dation for a contract theory and thereby coming within the purview of the Tucker Act. The court of appeals stated at page 521:

> "When, therefore, the Secretary of Agriculture published bulletins and promulgated rules providing for the payment of subsidies to those naval stores producers who accepted the offer by voluntarily coming under, and complying with, the Act, there was revealed the traditional essentials of a contract, namely, an offer and an acceptance, to the extent that we should hesitate to hold that there was not at least an implied contract to pay subsidies, in some amount, and that a claim thereunder would also be founded upon a regulation of an executive department."

Although the regulation involved in *Aycock-Lindsey* expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conversation and Domestic Allotment Act, it is not the application of that Act to the regulations that is important in the instant case. What is important is the court's finding that an implied contract existed arising from the relationship between the regulations in question and those who comply with those regulations with an expectation of compliance by the other party.

The Court in ***Bodek,*** supra, at page 279 F. N. 7, stated that jurisdiction was conferred by the Tucker Act, 28 U.S.C., §1346(a)(2) because "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds. See ***Wolak v. United States,***" (cite omitted).

Petitioner argues that such cases are inapplicable or no longer the law. However, each of these cases, although their facts

differ from the facts of the instant case, clearly supports Respondent's position that an implied-in-fact contract exists.

In addition, the court of appeal's decision is further supported by ***Augusta Aviation, Inc. v. United States***, 500 F. Supp. 785 (1980). Although the facts in ***Augusta*** are distinguishable from the facts of the instant case, the theory of law is the same. In ***Augusta***, the District Court stated at 786:

> A contract implied-in-fact is one inferred from the conduct of the parties and the surrounding circumstances. (cite omitted) The contractual relationship between the parties here is based upon the numerous requirements imposed upon Plaintiff by the Veterans Administration. The Administration impliedly invites institutions to enroll veterans by promulgating rules and regulations governing their conduct. This represents one of the traditional essentials of a contract - the offer. (cite omitted)
>
> By compying with these regulations and enrolling veterans, an institution accepts the offer. The Administration benefits by having schools available which offer and provide "approved" educational programs to veterans, and the school is assured that a large part of the cost of the education will be paid. Thus, the arrangement included the final sine qua non of contract formation, that of consideration.

Applying the elements of implied-in-fact contracts to the facts of the instant case, there is an offer by Petitioner in the promulgated regulations regarding termination of employment. There was an acceptance by Respondent by voluntarily (i) entering into the employment of AAFES, both initially and subsequently in the EMP program, with the expectation that AAFES would comply with its regulations; (ii) continuing

employment by Respondent with the expectation that AAFES would comply with its regulations: and (iii) following and complying with the regulations at the time of Respondent's separation and termination. In fact, before Respondent was accepted as an EMP employee, he had to acknowledge in writing his understanding, *inter alia*, the regulations regarding termination of EMP employees. The final sine qua non is the benefit and burdens accepted by both parties in the employment agreement.

The Petitioner would have this Court believe that the court of appeals can not distinguish between a contract implied-in-fact and a contract implied-in-law. What is clear, is that Petitioner would prefer for the contract implied -in-fact to be construed as a contract implied-in-law, as a contract implied-in-law does not give rise to a substantive right under the Tucker Act. *Merritt v. United States*, 267 U.S. 338, 341 (1925). Petitioner is incorrect; not only did the court of appeals note the distinction between a contract implied-in-fact and a contract implied-in-law, the Court well reasoned the difference and found that there was a contract implied-in-fact. Therefore, based on the foregoing authorities, this Court should affirm the decision of the court of appeals and remand the case for trial on the merits.

## ARGUMENT FOR POINTS D AND E

D. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH IMPLIED-IN-FACT CONTRACT IS PART OF AN EXPRESSED EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

E. THERE IS AN IMPLIED-IN-FACT CONTRACT BETWEEN RESPONDENT AND PETITIONER ARISING

OUT OF THE AAFES REGULATIONS REGARDING DISCHARGE PROCEDURES WHICH CONTRACT IS PART OF AN EXPRESSED EXECUTIVE MANAGEMENT PROGRAM EMPLOYMENT CONTRACT BETWEEN RESPONDENT AND PETITIONER.

It is Respondent's position that Respondent was employed by AAFES, originally and subsequently as an EMP employee, pursuant to express contracts. Further, Respondent contends that the implied-in-fact contracts (discussed supra in Points B and C) are a part of these express employment contracts.

In the instant case, as in *Hopkins*, supra, there has been no evidentiary hearing at any time, in which a record has been made, to determine whether Respondent was employed by virtue of contract(s) or by appointment. The district court summarily dismissed Respondent's complaint without a hearing and without argument of counsel.

Respondent has not found, nor has Petitioner presented to this Court, any case or authority that specifically addresses the employment status of an EMP employee of the AAFES. The cases cited by Petitioner in regards to the status of employment of respondent as an ordinary AAFES employee are distinguishable from the facts of this case. The instant case, therefore, is one of first impression. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of expressed contract or by appointment, and this is more particularly so in regard to his EMP status. Therefore, the District Court possesses jurisdiction pursuant to the Tucker Act.

If the District Court determines that the Respondent was employed by express contract, it can further determine that there exists an implied contract regarding termination as a part of the express employment contract (AR 60/21 AFR 147-15, Section II) between Respondent and Petitioner under

reasoning of ***Bodek v. Department of Treasury***, 532 F.2d 277 (2d Cir. 1976), cert denied 975 Ct. 137, 429 U.S. 849, 50 L. Ed. 2d 122; ***Wolak v. United States*** , 366 F. Supp. 1106 (D. Conn. 1973); ***United States v. Chandler***, 410 U.S. 257, 93 S. Ct. 880, 35 L. Ed. 2d 247 (1973).

In ***Bodek***, supra, the plaintiff sued the Department of the Treasury to issue him duplicate bonds pursuant to 31 U.S.C. §738a and Treasury Department Regulations (31 CFR, §315. 25) Jurisdiction in the Federal District Court was conferred by the Tucker Act, 28 U.S.C., §1346(a)(2) because, as the Court noted at page 279 F. N. 7:

> "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds. See ***Wolak v. United States*** [cite omitted]; ***United States v. Chandler***[cite omitted].

The Court in ***Wolak***, supra, noted:

> "That pertinent federal regulations are an implied part of the contract between the Government and a purchaser of savings bonds, and hold[s] that the Government has a consequent contractual duty to comply with its regulations in redeeming savings bonds." 366 F. Supp. 1110

In holding that the Government made an implied promise to abide by its regulations, the Court stated:

> "It is well established that Savings Bonds are issued pursuant to a contract between the purchasers and the United States. The Treasury Regulations constitute a part of that contract." ***Spicer v. United States***, 217 F. Supp. 44, 50

(D. Kan. 1963), aff'd 332 F.2d 750 (10th Cir. 1964)." 366 F. Supp. 1111

". . . When (the government's) paying agent redeemed plaintiff's bonds in violation of pertinent federal regulations, the Government incurred liability to plaintiff for the foreseeable damages plaintiff suffered by virtue of this breach of contract. ***Ramsey v. United States,*** 101 F. Supp. 353, 356-367, 121 Ct. Cl, 426 (1952), cert. denied 343 U.S. 977, 72 S. Ct. 1072, 96 L. Ed. 1369 (1952); ***Thompson v. Rector,*** 83 U.S. App. D. C. 371, 170 F. 2d 167, 169 (1948)." 366 F. Supp. 1112

While this line of cases is distinguishable from the instant case on its facts, the rules of law are applicable. If, on remand, the district court finds that an express contract of employment did exist between Respondent and Petitioner (which would give Respondent both a substantive right and jurisdiction under the Tucker Act), then, by analogy to the above-stated rules of law, the termination procedures contained in the AAFES regulations constitute an implied part of the express contract.

In the instant case, Petitioner submits that the regulations are merely a rule of administrative law and do not give rise to a claim for damages under a breach of contract theory. This same argument was offered and rejected in***Wolak,*** supra. In ***Wolak***, supra, the government argued that its regulations were not intended to benefit owners of the bonds but were designed to avoid administrative burdens. The Court stated "The government's position is supported by neither precedent nor common sense". 366 F. Supp. 1114.

Therefore, the implied contract between the parties arising

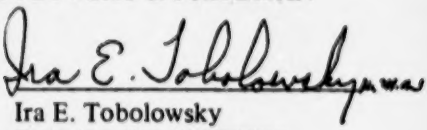
out of AAFES regulations is a part of the express employment contract(s) both of which give the district court jurisdiction pursuant to the Tucker Act.

## CONCLUSION

Based on the foregoing, the judgment of the court of appeals should be affirmed and the case remanded to the district court for a trial on the merits. In the alternative, the judgment of the court of appeals should be affirmed on other grounds and the case should be remanded to the district court for trial on the merits.

Respectfully submitted,

TOBOLOWSKY & FRIEDMAN

By: 

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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ARMY AND AIR FORCE EXCHANGE SERVICE
PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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REX E. LEE
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*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

*v.*

ARTHUR EDWARD SHEEHAN

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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Respondent does not take issue with our statement of the general principles applicable to this case. The AAFES is an instrumentality of the United States and therefore shares the government's sovereign immunity. The doctrine of sovereign immunity bars any suit against the government unless the government has consented to be sued, and such consent may not be implied but must be unequivocally expressed. Accordingly, a suit against the government for money damages may not be maintained unless founded upon a constitutional provision, statute, or regulation expressly conferring the right to recover such damages from the United States or upon a lawful contract

obligating the government to pay money. See Pet. Br. 7-8.

In our opening brief, we argued that respondent's action was not based upon any such constitutional provision, statute, regulation, or contract and that his suit had therefore been properly dismissed for lack of subject matter jurisdiction. Respondent's brief does not contend that the requisite waiver of sovereign immunity may be found in a constitutional provision, statute, or regulation. Instead, he claims only that his action was based upon an express or implied-in-fact contract with the AAFES. Respondent's argument, however, clearly lacks merit, not only because it is apparent that no such contract was made, but also because he failed to satisfy his burden of pleading and proving the existence of such a contract when his case was in the district court.

1. Under Fed. R. Civ. P. 8(a), every complaint must contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." This provision requires that the complaint allege all facts necessary to show that jurisdiction exists. See, *e.g.*, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Schultz* v. *Cally*, 528 F.2d 470, 474 (3d Cir. 1975); 2A *Moore's Federal Practice* ¶ 8.07[1], at 8-43 & n.5 (2d ed. 1981). Since courts lack jurisdiction to entertain a suit barred by sovereign immunity (*United States* v. *Mitchell*, 445 U.S. 535, 538 (1980)), a complaint against the United States or an agency or instrumentality that shares its sovereign immunity must allege all facts necessary to show a valid waiver of sovereign immunity. See *Vorachek* v. *United States*, 337 F.2d 797, 799 (8th Cir. 1964).

Not only must the plaintiff include such allegations in his complaint but, more important, if jurisdic-

tion is challenged by the defendant or the court sua sponte, the plaintiff bears the burden of proving that jurisdiction exists. See, *e.g.*, *McNutt* v. *General Motors Acceptance Corp.*, *supra*, 298 U.S. at 189; *Familia De Boom* v. *Arosa Mercantil, S.A.*, 629 F.2d 1134, 1138 (5th Cir. 1980), cert. denied, No. 80-1322 (May 18, 1981); *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 904 (1st Cir. 1980). The method or form of proof required is a matter within the discretion of the district court. See, *e.g.*, *Gibbs* v. *Buck*, 307 U.S. 66, 71-72 (1939); *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F.2d 1320, 1323-1324 (3d Cir. 1972). The court need not conduct an evidentiary hearing but "may inquire, by affidavits or otherwise, into the facts as they exist." *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). See also, *e.g.*, *Tanzymore* v. *Bethlehem Steel*, *supra*, 457 F.2d at 1322-1324; *Trager* v. *New Rochelle Hospital Medical Center*, 453 F.Supp. 516, 519 n.1 (S.D.N.Y. 1978).

In the present case, respondent utterly failed to discharge his burden of pleading and proving jurisdiction. His complaint made no reference whatsoever to a contract with the AAFES (J.A. 3-10). Even after the AAFES moved to dismiss his complaint for lack of subject matter jurisdiction and noted that he had been "an appointed (non-contract) employee,"[1] respondent did not seek to amend his complaint to allege that he had been employed pursuant to contract. Nor did he submit an affidavit or any other proof. He merely submitted a memorandum of law in opposition to the motion to dismiss, and even there he failed to mention any facts showing that he had been em-

[1] Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment at 8.

ployed under contract.[2] Indeed, his memorandum stopped short of asserting that such a contract had been made.[3] After receiving respondent's submission, the district court dismissed his complaint.

The court of appeals attempted to rescue respondent from his procedural default by holding that "[t]he allegation [in respondent's complaint] that [his] discharge violated controlling regulations was * * * equivalent to an allegation of breach of an implied-in-fact contract" (Pet. App. 9a). But since there were no allegations or proof in the record concerning such a "contract," the court was forced to infer its existence and terms solely from AAFES personnel regulations. The court concluded (*id.* at 8a; emphasis in original):

> These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him.

As we noted in our opening brief (Pet. Br. 24), the court of appeals plainly confused a contract implied in fact with a quasi-contract or contract implied in law. And since the Tucker Act does not furnish jurisdiction for claims founded upon quasi-contracts or contracts implied in law (*Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5

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[2] See Memorandum of Authorities in Opposition to Defendants' Motion to Dismiss or in the Alternative, for Summary Judgment.

[3] See *id.* at 5-6.

(1980)), the "contract" found by the court of appeals provided no basis for invoking the jurisdiction of the federal courts.

Respondent contends (Resp. Br. 19) that the court of appeals could not have made the elementary mistake of confusing a contract implied in law or a quasi-contract with a contract implied in fact. But the court of appeals relied solely upon provisions of law—AAFES regulations—in concluding that the AAFES had contracted with respondent. The court made no reference to any facts bearing upon the actual understanding of the parties. Accordingly, it is abundantly clear that the "contract" identified by the court could only be a contract implied in law or a quasi-contract. See Pet. Br. 23-24. Moreover, because the record is devoid of allegations or proof concerning the parties' understanding or intent, there was no rational basis for concluding that the parties had entered into an actual agreement in the form of an implied-in-fact contract. Indeed, as far as the record reveals, both respondent and the AAFES might have expressly acknowledged that respondent was to be employed pursuant to appointment, rather than contract.

The potential implications of the court of appeals' erroneous decision are far-reaching. Because the court relied solely upon AAFES personnel regulations rather than any special facts concerning respondent's case, the court's decision presumably means that all AAFES employees work pursuant to contract. In addition, the court's reasoning provides no basis for distinguishing the AAFES regulations at issue here from other AAFES regulations affecting employees' rights. Thus, if the former regulations "manifest the understanding" of the AAFES and its employees

(Pet. App. 8a), the same is presumably true of the latter. Furthermore, the logic of the court's decision would appear to extend beyond the AAFES and to encompass virtually all federal employees and virtually all federal regulations that bear upon their rights. As a result, according to the court's reasoning, sovereign immunity would not bar any suit against the government for money damages brought by an employee claiming a violation of any such regulations. In short, the court's reasoning would lead to the elimination of a large portion of the government's sovereign immunity.[4] Moreover, as noted in our open-

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[4] Respondent relies (Resp. Br. 16-18, 20-22) upon four cases to demonstrate the correctness of the decision below, but all are readily distinguishable. In *Bodek* v. *Department of the Treasury*, 532 F.2d 277, 279 n.7 (2d Cir. 1976), and *Wolak* v. *United States*, 366 F.Supp. 1106 (D. Conn. 1973), the courts stated that Treasury regulations governing the redemption of United States Savings Bonds and the replacement of stolen bonds form part of the express contract between bondholders and the government. Since there was no express contract between respondent and his employer, those cases have no application here.

In *Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518 (5th Cir. 1948), a producer of naval stores brought suit against the government for money allegedly due under the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590a *et seq.* Under that Act, subsidies are paid to eligible producers who comply with certain requirements. The court held that sovereign immunity did not bar the suit for two reasons. First, the court held that since the action was based upon federal statutes and regulations, the Tucker Act waived sovereign immunity. That portion of the decision was overruled by the holding in *United States* v. *Testan*, 424 U.S. 392, 398 (1976), that the Tucker Act does not waive sovereign immunity but merely furnishes jurisdiction for suits to which the government has consented. The court in *Aycock-Lindsey Corp.* also held that the government had entered into an implied

ing brief (Pet. Br. 21-22), that reasoning is fundamentally inconsistent with *United States* v. *Testan*, 424 U.S. 392 (1976).

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contract with the producer because it had "published bulletins and promulgated rules" expressly promising to pay eligible producers who complied with certain requirements (171 F.2d at 521). In the present case, by contrast, the AAFES did not promise expressly or impliedly to pay damages to wrongfully discharged employees. On the contrary, by excluding such employees from the coverage of the Back Pay Act, Congress expressly stated that no such payments would be made. In addition, *Aycock-Lindsey Corp.* did not involve the relationship between the government or a governmental instrumentality and its employees—an area in which appointment, rather than contract, has been the traditional mode of employment (see Pet. Br. 17). For that reason and because the nature of the relationship between the government and its appointed employees has no analog in the government's dealings with private businesses, facts that might justify inferring a contractual relationship in the latter field may not suffice in the former.

*Augusta Aviation, Inc.* v. *United States*, 500 F.Supp. 785 (S.D. Ga. 1980), involved statutes expressly granting educational benefits to eligible veterans enrolled in approved training. See 38 U.S.C. 1651 *et seq.* The Veterans' Administration first notified a school providing such training that a particular veteran was entitled to substantial benefits but later, after the training was completed, informed the school that the veteran was actually entitled to much less. The school brought suit, and the court held that the Veterans' Administration had impliedly agreed to pay the amount initially indicated. *Augusta Aviation* is distinguishable from this case not only because it arose outside the area of government employment and concerned statutes expressly promising to pay money, but also because it involved a communication that may be construed as an express promise to pay a certain amount to the veteran in question. Moreover, unlike respondent, the plaintiff there adduced substantial evidence to support its contract claim.

2. Respondent contends (Resp. Br. 11-15, 19-23) that even if the court of appeals' reasoning is unsound, its decision nevertheless may be affirmed on two other grounds. First, respondent urges (Resp. Br. 14, 15, 16, 18-19) this Court to find that he entered into a contract with the AAFES when he was accepted into the Executive Management Program. However, as we pointed out in our opening brief (Pet. Br. 18-19), it is apparent from the face of the regulations concerning that program that participants are not employed under contract but are appointed like the vast majority of AAFES and federal employees. Moreover, even if such a contract had been made, respondent's failure to mention it in his district court filings was surely fatal. As noted, respondent had the burden of pleading and proving jurisdiction in the district court.

3. Finally, respondent maintains (Resp. Br. 11-15) that the district court erred in dismissing his complaint for lack of subject matter jurisdiction without conducting an evidentiary hearing. As we have noted, however (see page 3, *supra*), a district court is not obligated to hold such a hearing but may adjudicate the question of jurisdiction using any reasonable method it chooses. In this case, where respondent failed to plead or offer any evidence proving necessary jurisdictional facts, there was plainly no need for an evidentiary hearing. It makes no sense to suggest that the district court was required to conduct such a hearing to determine whether respondent had entered into a contract with his employer when respondent did not even allege that such a contract existed.

Respondent relies upon *United States* v. *Hopkins*, 427 U.S. 123 (1976), but his reliance is clearly mis-

placed.[6] In *Hopkins*, a discharged AAFES employee brought suit for money damages in the Court of

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[6] Respondent's treatment of *United States* v. *Testan*, 424 U.S. 392 (1976), is equally unpersuasive. In our opening brief, we contended (Pet. Br. 19-22) that the decision below cannot be reconciled with *Testan*, in which claims brought against the United States for money damages by federal employees were held to be barred by sovereign immunity. We noted that the complaint in *Testan*, like that here, alleged violations of provisions of law dealing with personnel matters and that neither complaint contained allegations concerning a contract of employment. We reasoned that if an implied-in-fact contract could be inferred in the present case, a similar inference presumably should have been drawn in *Testan*.

In answer to our argument, respondent quotes (Resp. Br. 14) this Court's statement in *Testan* that the plaintiffs "[did] not rest their claims upon a contract" (424 U.S. at 399) and the statement that their action "is not one concerning a wrongful discharge or a wrongful suspension" (*id.* at 402). He then concludes (Resp. Br. 15):

> [T]he implication is clear that a claim upon a contract and a claim for wrongful discharge * * * are substantive rights enforceable against the United States for monetary damages under the Tucker Act.

In our view, half of respondent's conclusion is illogical and incorrect and the rest is beside the point. First, simply because the suit in *Testan* was not one for wrongful discharge or suspension, it does not follow that the Tucker Act would furnish jurisdiction for such a suit. On the contrary, the teaching of *Testan* is that such a suit would be barred unless predicated upon a provision of law containing an express waiver of sovereign immunity. Second, while it is true that sovereign immunity would not bar an action founded upon a lawful contract obligating the United States to pay money, that proposition neither answers our argument based upon *Testan* nor disposes of this case. The issue presented by the decision below is whether any such contract may be properly found based upon the record in this case, and in our opening brief we maintained that inferring the existence of such of contract based solely upon provisions of law concerning personnel matters was inconsistent with the result in *Testan*.

Claims and alleged that he had been employed pursuant to contract. Citing precedent holding that AAFES employees are not federal employees (who generally serve by appointment), Hopkins argued that his relationship with the AAFES was therefore contractual, just like the relationship between employers and employees in the private sector. The Court of Claims accepted his argument (*Hopkins* v. *United States*, 513 F.2d 1360 (1975), thus obviating the need for him to submit any proof concerning the nature of his employment relationship with the AAFES. This Court reviewed the denial of the AAFES' pretrial motion to dismiss and rejected the lower court's reasoning. It concluded that most AAFES employees, like most federal employees, are appointed to their positions (427 U.S. at 127-128). However, the Court noted that certain AAFES regulations authorize a small category of employment or "service contract[s]" for "services performed off a military installation and 'direct services such as janitorial and window cleaning service' " (*id.* at 129, quoting AR 60-20/AFR 147-14, App. A, ¶ A-6*e*). Holding that Hopkins' "allegation that his discharge constituted a breach of a contract of employment was sufficient * * * to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction * * *" (427 U.S. at 130), the Court remanded the case to the Court of Claims with instructions that "the question of whether [Hopkins] was employed by virtue of a contract or by appointment" "depends upon an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case" (*ibid.*).

Although respondent contends that this Court should dispose of his case as it did *Hopkins*, there is

no justification for similar treatment here. First, whereas Hopkins' complaint alleged that his discharge constituted a breach of contract, respondent's complaint contains no such allegation. Second and more important, Hopkins, unlike respondent, had not failed to discharge his responsibility of proving essential jurisdictional facts at the trial level. Because the Court of Claims accepted Hopkins erroneous argument that he had been a contract employee simply because he had not been a federal employee, Hopkins had no occasion to offer whatever proof he might have possessed showing that he was a contract employee in a more conventional sense. Conceivably Hopkins might have possessed a written "service contract" of the type described by this Court. However unlikely it appeared that Hopkins could adduce such proof, the Court obviously felt that it would be unfair to require the dismissal of his suit without at least affording him the opportunity to submit whatever evidence he had.

Respondent, on the other hand, had a full opportunity to plead and prove essential jurisdictional facts but failed to do so. Moreover, respondent had the benefit of this Court's decision in *Hopkins* explaining the nature of employment by the AAFES and the effect of the doctrine of sovereign immunity upon suits such as his. There is consequently no justification for giving respondent a second chance to do what he should have done long ago. In addition, respondent's failure, even at this late date, to refer to any facts substantiating the existence of his alleged contract with the AAFES strongly suggests that he has no such proof and that remanding this case for an evidentiary hearing would be a pointless gesture.

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

REX E. LEE
*Solicitor General*

FEBRUARY 1982

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